Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1244

EVELYN FALKOWSKI,
Petitioner,

v.

LOWELL PERRY, *et al.*,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

BERTRAM PERRY,
Respondent,

v.

ALVIN GOLUB, *et al.*,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents,

and

EVELYN FALKOWSKI,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. -

EVELYN FALKOWSKI,

Petitioner,

v.

LOWELL PERRY, *et al.*,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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BERTRAM PERRY,

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ALVIN GOLUB, *et al.*,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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and

EVELYN FALKOWSKI,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Evelyn Falkowski petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals of July 25, 1979 is unpublished, and appears at Petitioner's Appendix B, and the court of appeals decision of October 24, 1979 denying rehearing appears at Petitioner's Appendix A. The opinion of the district court of November 21, 1978 is reported at 464 F. Supp. 1016 and appears at Petitioner's Appendix C. Related opinions in these consolidated cases include a district court opinion of September 11, 1975 reported at 400 F. Supp. 409 and appearing at Petitioner's Appendix K, a district court opinion of November 30, 1976 reported at 74 F.R.D. 360 and appearing at Petitioner's Appendix F, an unpublished court of appeals opinion of April 25, 1979 appearing at Petitioner's Appendix E, and an unpublished court of appeals opinion of May 29, 1979 appearing at Petitioner's Appendix D.

In *Perry v. Golub, et al.*, the defendants, at the time of filing, included Alvin Golub and Donald L. Hollowell, then, respectively, the Acting Executive Director and Southeastern Regional Director of the Equal Employment Opportunity Commission (EEOC), and the Petitioner. In *Falkowski v. Lowell Perry, et al.*, Lowell Perry was the then Chairman of the EEOC, and the other defendants include the Commissioners and other officials in the chain of command of the EEOC.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) denying rehearing was entered on October 24, 1979. On January 9, 1980, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 11, 1980. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Since this court has established that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction, *Sibron v. State of New York*, 392 U.S. 40, 57 (1968), can Petitioner be denied appellate review of district court findings imputing criminal activity to her in a civil case determined otherwise to be moot, unless the court of appeals also makes a determination that no collateral legal consequences will be imposed on the basis of those findings?

2. When the court of appeals summarily disposed of Petitioner's appeal as moot, did minimum due process requirements dictate that the court of appeals also summarily reverse all findings adverse to Petitioner for the purpose of restoring the *status quo ante* to protect Petitioner from collateral estoppel in related pending litigation and to mitigate other adverse collateral consequences to Petitioner?

STATEMENT

Perry v. Golub was commenced under 28 U.S.C. §§ 1343, 2202, 5 U.S.C. §§ 701, 706; 42 U.S.C. §§ 1981, 1985 and 1986 and the First Amendment to the U.S. Constitution.

Falkowski v. Lowell Perry was commenced under 28 U.S.C. §§ 1343 and 1361; 5 U.S.C. §§ 702 and 704; 42 U.S.C. 2000(e) *et seq.*; 42 U.S.C. §§ 1981, 1983 and 1985.

After the 1975 decision in *Perry v. Golub* (Petitioner's Appendix K), Petitioner was involuntarily dismissed as a

defendant on Respondent Bertram Perry's motion (Pet. App. G). When Petitioner filed *Falkowski v. Lowell Perry*, the cases were consolidated.

The district court opinion (Pet. App. C) resulted from petitions by the Respondent EEOC to transfer Petitioner and Respondent Bertram Perry from the Birmingham District Office (BIDO) of the EEOC. After consolidated hearings, the district court entered findings that Bertram Perry was a "whistle blower" for having brought to the attention of the U.S. attorney and others irregularities and mismanagement that imputed criminal activity to Petitioner.

There has never been a trial on the merits or a full evidentiary hearing in either case.

The district court entered orders granting EEOC's petition as to Petitioner but not as to Bertram Perry. Petitioner was promptly demoted and transferred to Washington, D.C.

The court of appeals, in summary disposition of the appeal, limited its action to merely vacating the district court's orders on the grounds that the case was moot. It did not review the findings against Petitioner nor did it order that these findings be reversed to restore the *status quo ante*. It left the findings undisturbed exposing Petitioner to collateral estoppel in related pending litigation.

Petitioner has been sued by Bertram Perry in a jury case, *Perry v. Falkowski, et al.*, Civil Action No. 78-M-0935-S; pending in the same district court seeking an award of damages against Petitioner based on the findings against Petitioner in the case at bar. Bertram Perry has indicated his intention to collaterally support his claims

in *Perry v. Falkowski, et al.* with the findings made in the case at bar.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS BY IMPLICATION DISTINGUISHES BETWEEN THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS AND FINDINGS OF CRIMINAL ACTIVITY IN A CIVIL CASE WHICH INDICATES THE LAW IS UNSETTLED.

In a series of cases, this court has established that a criminal case can be considered moot for purpose of appellate review *only* if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. *Sibron v. State of New York*, 392 U.S. 40, 57 (1968); *Street v. New York*, 394 U.S. 576 (1969); *Ginsberg v. State of New York*, 390 U.S. 629 (1968). These cases negated mootness even though sentence had been served because of collateral legal consequences, such as the use of the conviction to impeach character, impairment of credibility as a witness or party in future litigation, civil or criminal, the impairment of the ability to keep or obtain a license to conduct a chosen business, or to be employed in a chosen field.

A delay in determining the effects should be avoided, *Sibron*, 393 U.S. at 56, 57:

> . . . the sooner the issue is fully litigated the better for all concerned. It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover, litigation is better conducted when the dispute is

> fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade. And it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action.

In the case at bar, the district court has made findings (Pet. App. C, pp. 7a, 15a-18a, and Pet App. K, pp. 59a-69a, 76a) imputing criminal conduct to Petitioner in a civil case. The court of appeals (Pet. App. B) has left these findings undisturbed.

The court of appeals declined to apply, to the case at bar, the principles of its prior decisions in *Connell v. Shoemaker,* 555 F.2d 483 (5th Cir. 1977), and *United States v. Schrimsher* (In re Butts), 493 F.2d 842 (5th Cir. 1974). In *Connell,* the U.S. Army determined that a complaint of racial discrimination in housing had been sustained with respect to certain rental apartments and sanctioned the owner by prohibiting military personnel stationed at Fort Hood from entering leases for his apartments for a period of 180 days. The owner, Connell, filed suit, but when the 180 day period expired, the district court dismissed the case as moot. The court of appeals reversed, 555 F.2d at 486:

> . . . we view the continuing practical consequences of the Army's determination of discrimination as sufficient to negate mootness. Appellants have interests in various businesses engaged in retail sales of goods and services directly to the public in the area adjacent to Fort Hood. Since a favorable public image is vital to the success of such enterprises, the imputation of bigotry implicit in the Army's widely publicized sanctions against Appellant could not but harm their reputations and, concomitantly, their livelihoods with clientele both black and white. Additionally, Appellant Ted Connell has various local, civil and elective political positions; whatever such aspirations he might yet harbor have almost certainly been undercut by the same stigma.

The court in *Connell* also discussed its prior decision in *Schrimsher, supra,* in which a lawyer was summarily sentenced for criminal contempt to confinement in jail for 1½ hours during a trial. In *Schrimsher,* the court ruled that the existence of potential collateral consequences, such as the possibility of harm to the attorney's practice of law and to his opportunities for appointment to the bench or election to political office are sufficient reasons to negate mootness. The court stated "Although the present case [*Connell*] does not involve a criminal conviction, we view the collateral consequences in the two cases as analogous."

In the case at bar, the court of appeals, by implication or default, distinguishes between cases where a person has been *convicted* of criminal activity, and civil cases in which a party is found to be guilty of criminal conduct. The law appears to be unsettled, insofar as the court of appeals below is concerned, although Petitioner finds it difficult to distinguish the collateral legal and practical consequences imposed on Petitioner by the district court findings from those found to exist in *Connell* and *Schrimsher.*

Immediate collateral legal consequences will be faced by Petitioner in *Perry v. Falkowski, et al., supra,* pending in the same district court. Petitioner is faced with the immediate problem of whether the findings of criminal conduct on her part in the case at bar can be used as

evidence in *Perry v. Falkowski, et al.* either to rebut character evidence adduced by Petitioner, for impeachment, to establish facts, or to raise presumptions or inferences adverse to Petitioner.

Furthermore, Petitioner is a lawyer, and is exposed to the same or greater disabilities than those that concerned the court in *Schrimsher.* She has been found by the district court, to be guilty, not of contempt, but of crimes of moral turpitude—of purposely failing conciliation of cases in order to increase the business of attorneys friendly to her. She has had a distinguished career as an administrator with EEOC, but the findings below have resulted in her demotion and transfer.

Petitioner is also faced with adverse collateral consequences from the gratuitous references in the opinion to Petitioner as "a raving maniac" and a "wild screaming woman in a fit of hysteria" (Pet. App. C, pp. 13a-14a). Indeed, Petitioner and her family, long-time residents of Birmingham, have already been subjected to public scorn and ridicule by the front page publicity given to the district court opinion.[1] The official reports of the decision stand as a barrier to further assignment of

[1] *The Birmingham News,* November 22, 1978 carried a front page headline "U.S. Judge: EEOC Retaliated Against City 'Whistle Blower' and Ignored Incompetence".

The ensuing article then quoted at length from the district court's opinion (Pet. App. C, pg. 7a) stating that Bertram Perry was found to be a whistle blower for exposing irregularities in the Birmingham office to the U.S. Attorney, that the court said EEOC may seek disciplinary action and try to transfer the director of the Birmingham office, Mrs. Evelyn Falkowski, that the "order characterizes some of her behavior as 'the fit of a raving maniac,'" and quotes the district judge: "It is frightening to think that the Civil Service Board would discipline an employee for countermanding the orders of a wild, screaming woman in a fit of hysteria."

Petitioner as an administrator, or to any promotion. Her ability to successfully litigate the related case, *Perry v. Falkowski, et al.,* has been impaired; she will stand before the jury judicially branded as a "raving maniac" and a "wild screaming woman".[2]

II.

DUE PROCESS REQUIRED THAT THE COURT OF APPEALS EITHER REVIEW THE DISTRICT COURT FINDINGS, OR AT MINIMUM, SUMMARILY REVERSE THESE FINDINGS TO RESTORE THE *STATUS QUO ANTE* AND PRESERVE PETITIONER'S RIGHTS.

An appellate court determination that a case is moot requiring dismissal of lower court judgments, without more, does not suggest that the appellate court determines the propriety of findings made by the lower court, *St. Louis-San Francisco Railway Co. v. Railroad Yard Masters of America,* 347 F.2d 983 (5th Cir. 1965).

In disposing of lower court judgments of a case considered moot, the appellate court should determine what its order with respect to the district court opinion should be on the basis of "what will 'be most consonant to justice' in view of the conditions and circumstances

[2] This court has firmly established that appellate courts be particularly sensitive to suggestions of lack of impartiality. *Berger v. United States,* 255 U.S. 22, 35-36 (1921):

> ". . . [T]ribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial . . . ."

The sixth circuit court of appeals recognized this principle recently in reversing a district court opinion because the district judge used language against one of the parties which is mild in comparison to that used in the case at bar. *Nicodemus v. Chrysler,* 596 F.2d 152, 155 (6th Cir. 1979).

of the particular case," *United States v. Hamburg-American S.S. Co.*, 239 U.S. 466, 478 (1915).

When a case on appeal has become moot, the action of the appellate court must "dispose of the cause, not merely of the appellate proceedings which brought it here", *Baltimore and Ohio Railroad Co. v. Anchor Coal Company*, 279 U.S. 812 (1928). Even though a case has become moot, the judgment of the district court must be reversed and remanded to allow further proceedings if necessary to preserve the rights of all interested parties, *South Spring Hill Gold Mining Co. v. Amador Gold Mining Co.*, 145 U.S. 300 (1892).

Fairness requires that, at minimum, an appellate court's order with respect to a moot case restore the *status quo* to preserve the rights of the parties. Fundamental principles of due process require that a court of appeals either subject findings adverse to a party to appellate review on the merits, or at least summarily reverse any such findings, without prejudice, to preserve the rights of the parties. It is fundamentally unfair to shield findings of criminal activity from both appellate review and summary reversal by a determination that the case is moot.

CONCLUSION

This Petition should be granted for the reasons specified in Rule 19(1)(b) of this court.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

October 24, 1979

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

[Filed: Oct. 29, 1979]

TO ALL PARTIES LISTED BELOW:

No. 78-3716—Evelyn Falkowski v. Lowell Perry, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petitioner( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Gilbert F. Ganucheau, Clerk

cc: Ms. Margaret A. Beller
Ms. Evelyn Falkowski
Mr. Owen E. Perry
Ms. Vella M. Fink
Mr. William F. Gardner

By /s/ Sally Hayward
Deputy Clerk

APPENDIX B

DO NOT PUBLISH

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3716
Summary Calendar*

EVELYN FALKOWSKI,
Plaintiff-Appellant,

v.

LOWELL PERRY, ETC., ET AL.,
Defendants-Appellees,

* * *

BERTRAM PERRY,
Plaintiff-Appellee,

v.

ALVIN GOLUB, ET AL.,
Defendants-Appellees-Appellants,

and

EVELYN FALKOWSKI,
Defendant-Appellant.

*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

Appeals from the United States District Court
for the Northern District of Alabama

July 25, 1979

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

A brief recital of the underlying facts in these consolidated cases will facilitate an understanding of the disposition of the appeal before us.

Mrs. Falkowski was the District Director of the Jackson, Mississippi, District Office of the Equal Employment Opportunity Commission (EEOC) before November 4, 1974. Unable to secure a lateral transfer to the Birmingham, Alabama, District Office (BIDO), she filed suit against her employer, alleging discrimination. That case was amicably settled, the EEOC agreeing to give serious consideration to Mrs. Falkowski's application for transfer, and a consent decree consistent with the agreement was entered. As a result of that agreement and consent decree, Mrs. Falkowski was, on November 4, 1974, transferred to her present position as District Director of the BIDO.

On April 19, 1976, however, Mrs. Falkowski filed an action alleging that the defendants had failed to abide by the consent decree and were retaliating against her for bringing the prior action by refusing her the administrative support that was necessary for her to operate the BIDO effectively. On November 30, 1976, the district court dismissed the complaint without prejudice on account of mootness, but retained jurisdiction of the case

so that any proposal to remove Mrs. Falkowski from her position required approval upon petition to the district court.

Mr. Perry has been with the BIDO since 1968 and has been Deputy Director of that office since 1972. On August 15, 1975, Mr. Perry received notice that he was being "detailed" to Washington, D.C., effective August 25, 1975. He brought an action on August 18, 1975, seeking to enjoin the detail. The district court issued a preliminary injunction prohibiting the defendants from removing Mr. Perry from his position, based upon a finding that the "detail" was initiated largely as a result of the EEOC's attempts to suppress Mr. Perry's continual and outspoken protests of the BIDO's mismanagement and that the proposed "detail" was, in reality, a transfer from the BIDO. *Perry v. Golub,* 400 F.Supp. 409 (N.D. Ala. 1975). The preliminary injunction was dissolved on November 30, 1976, before the case was tried, on account of mootness, there then being no attempt to transfer Mr. Perry. The district court retained jurisdiction of the case to protect Mr. Perry from retaliation so that any attempt to remove Mr. Perry from his position required approval upon petition to the district court. *Perry v. Golub,* 74 F.R.D. 360 (N.D. Ala. 1976).

The conflict in the BIDO between Mrs. Falkowski and Mr. Perry raged on, however, and on November 7, 1977, seeking to process adverse action against both Mrs. Falkowski and Mr. Perry, the EEOC filed petitions with the district court, requesting permission to process adverse action against the complainants or, in the alternative, dissolution of the injunction. The district court denied the application to sanction Mr. Perry and granted the petition to sanction Mrs. Falkowski, thus holding that adverse action against Mr. Perry without the district

court's approval would violate the terms of the earlier order.

In the meantime, the EEOC had filed an appeal from the earlier order. On April 25, 1979, a panel for this Court decided that appeal. The decision affirmed the district court's initial dismissal of Mrs. Falkowski's and Mr. Perry's actions without prejudice on account of mootness and specifically held that the other orders, including the orders requiring the EEOC to seek the court's permission before altering the status of the complaining parties, were void for want of jurisdiction. The appeal before us now is from the orders issued in response to petitions which were apparently required by void orders. To the extent that the district court's orders, the subjects of this appeal, may be construed as orders continuing the injunctive features of the void orders of November 30, 1976, those judgments are summarily vacated.

VACATED.

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. ALABAMA, S.D.

**Civ. A. Nos. 76-G-0545-S,
75-G-1476-S**

Evelyn FALKOWSKI,
Plaintiff,

v.

Lowell PERRY, Chairman of the
Equal Employment Opportunity Commission, *et al.*,
Plaintiff,

Nov. 21, 1978 *v.*

Alvin GOLUB, *et al.*,

MEMORANDUM OPINION

GUIN, District Judge.

These consolidated cases are before the court on defendants' amended petitions for approval to propose to the Civil Service Board that adverse action be taken against plaintiffs. Plaintiff Falkowski is the Director of the Birmingham District Office of the Equal Employment Opportunity Commission (BIDO). Plaintiff Perry is the Deputy Director of that office. Defendants are officials of the Equal Employment Opportunity Commission (EEOC).

Mrs. Falkowski, before November 4, 1974, was the District Director of the Jackson, Mississippi, District Office. Unable to get a lateral transfer to Birmingham, she filed suit against her employer, alleging sex discrimination. That case was amicably settled, the EEOC agreeing to give serious consideration to Mrs. Falkowski's application for transfer, and a consent decree consistent with the agreement was entered. As a result of that agreement and the consent decree, Mrs. Falkowski was, on November 4, 1974, transferred to her present position as District Director of the BIDO.

The peace thus made was short lived. On April 19, 1976, Mrs. Falkowski filed the present action alleging that defendants had failed to abide by the consent decree and were retaliating against her for bringing the prior action, by failing to give her the administrative support that she required to run the BIDO effectively. By this court's order and an amendment thereto, the complaint was dismissed without prejudice, the court retaining jurisdiction of the case so that any proposal to remove Mrs. Falkowski from her position must be approved upon petition to this court.

Mr. Perry has been with the BIDO since 1968 and has been Deputy Director of that office since 1972. On August 15, 1975, Mr. Perry received notice that he was being "detailed" to Washington, D.C., effective August 25, 1975, ten days later. He then brought this action on August 18, 1975, seeking to enjoin the detail. At the preliminary injunction hearing, he established that the "detail" was initiated largely as a result of the EEOC's attempts to suppress his continual and outspoken protests of the BIDO's mismanagement, made to the Regional Director, the U.S. Attorney, and members of the public. The proposed "detail" was found to be, in reality, a transfer from the BIDO. Mr. Perry would have worked in Washington temporarily, but would have returned to work in an office other than the BIDO. Accordingly, this court issued a preliminary injunction prohibiting defendants from removing Mr. Perry from his position. *Perry v. Golub*, 400 F. Supp. 409 (N.D. Ala. 1975).

Before the case was tried, defendants petitioned for dissolution of the preliminary injunction and for permission to process adverse action against Mr. Perry. The petition was stricken for defendants' failure to comply with discovery orders. The preliminary injunction, however, was dissolved because there was no reason for its continued effect, there then being no attempt to transfer Mr. Perry. The court retained jurisdiction of the case to protect Mr. Perry from retaliation to the extent that any attempt to remove Mr. Perry from his position must be approved upon petition to this court. *Perry v. Golub*, 74 F.R.D. 360 (N.D. Ala. 1976).

On November 7, 1977, the defendants filed petitions to proceed against both plaintiffs before the Civil Service Board, there to seek their removal. Defendants later amended their petitions to pray for permission to seek plaintiffs' mere transfers to Washington to jobs with less prestige and responsibility but with the same pay. The issue before the court in both cases, thus, is whether the proposed adverse actions are motivated by retaliation.

The present actions are the culmination of a long-standing feud between Mrs. Falkowski and Mr. Perry. For almost four years, they have cursed, slandered, pushed, backbitten, and thrown wads of paper at one another. They have quarreled frequently in the presence of the public, charging parties, and employees of the BIDO.

The proposed notice of Mr. Perry's removal enumerates six reasons and sixteen specifications; that of Mrs. Falkowski's removal, twelve reasons and forty-one specifications. The charges against Mr. Perry are based principally upon his feuding with Mrs. Falkowski. The charges against Mrs. Falkowski are based upon her feuding with Mr. Perry and on her mismanagement of the BIDO.

Both plaintiffs are charged with improprieties regarding two principal confrontations. One occurred about 4:20 P.M. on July 18, 1977; the other at about 2:00 P.M. on October 17 of that year.

Mr. Perry had, on July 15, 1977, reprimanded an employee. On July 18, Mrs. Falkowski had a letter to Mr. Perry typed up criticizing his reprimand and left the letter on her desk during the day in a sealed envelope with his name on it. That afternoon, Mr. Perry saw the envelope and inquired as to its contents. Mrs. Falkowski refused to let him see it until shortly before 4:20 P.M., when she delivered it to his secretary. Upon reading the letter, Mr. Perry, as expected, lost his temper. Anticipating Mr. Perry's outrage,[1] and in need of material on which to base an adverse action proceeding against Mr. Perry, Mrs. Falkowski returned to her office, turned on a tape recorder concealed in her purse, and awaited the angry Perry's arrival.

She did not wait long. Mr. Perry, as anticipated, burst into Mrs. Falkowski's office, uttering a scream of obscenities that would curl a sailor's hair. During the confrontation, an employee approached Mrs. Falkowski's office and was ordered away by Mr. Perry. The verbal affray finally ended upon the arrival of the building security guard.

Mr. Perry is charged with using abusive language towards Mrs. Falkowski, engaging in the altercation, and usurping Mrs. Falkowski's authority in ordering the employee away from her office. Mrs. Falkowski is charged with provoking Mr. Perry into the exchange, and with

---

[1] (Understandable and justified, under all the circumstances, in the court's opinion.)

recording the altercation without Mr. Perry's permission, in violation of EEOC Order No. 165, Paragraph 6 (b).[2]

On October 17, 1977, Mr. Perry and some other employees were "sanitizing" copies of EEOC records, marking out and making illegible the names of charging parties before the copies were delivered to a party to a lawsuit, in compliance with discovery rules.

Mrs. Falkowski entered the office, assumed that Mr. Perry and the other employees were marking out names on the original records, and went into hysterics. Mr. Perry tried to explain to her that the documents were not originals, but was unable to do so. Mrs. Falkowski ordered the employees to stop marking out names and attempted to collect the records from the employees' desks. Mr. Perry instructed the employees to continue the sanitizing, countermanding Mrs. Falkowski's instructions. Mrs. Falkowski went about collecting the copies and shouting, "I am in charge." She then told Mr. Pugh, a supervisor, that she was appointing him Acting Deputy Director.

Mr. Perry is charged, in connection with this incident, with unprofessional conduct in having participated in the exchange. Mrs. Falkowski, for her part, is charged with unprofessional conduct, poor judgment, and mismanagement.

On July 25, 1977, Mr. Jeffrey issued written warnings to Mr. Perry and Mrs. Falkowski. The grounds for Mr. Perry's warning were conduct prejudicial to the government, the use of abusive language, and maintaining low

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[2] "*Recording of statement made in person:* Manual vertaim transcripts or the use of electronic or mechanical recording devices in hearings, meetings, interviews, and conversations are authorized only when advance notification is given to all participants that the recording or transcription will occur."

morale. The grounds for Mrs. Falkowski's warning were conduct prejudicial to the government, indecisive leadership, poor management practices, poor judgment in communications, unwillingness or inability to interact or relate, and maintaining low morale.

Double punishment for the same offense is violative of the procedures set forth in the Federal Personnel Manual.[3] Under EEOC Order No. 572, revised September 20, 1976, a letter of warning is a form of discipline. Therefore, any activities made grounds for the July 25, 1977, letters of warning could not properly be made grounds for the proposed adverse actions.

Though, at one point, the Federal Personnel Manual apparently contemplates that letters of warning and adverse actions may be grounded upon the same offenses, the EEOC's practice has been not to subject its employees to double discipline. In fact, there is only one other case in which the EEOC has proposed adverse action on grounds previously made the basis of other discipline.[4] There, the Civil Service Commission refused to allow the employee to be subjected to double jeopardy.

Mr. Jeffrey was notified of the confrontation of July 18, 1977, on July 21, 1977. He did not, however, learn that Mrs. Falkowski had tape recorded the spat until mid-August. Mr. Perry was punished for his part in the July 18 incident by the July 25 letter of warning. Mrs. Fal-

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[3] Section S3-2b (1) of that document reads, in part: "Under the same reasoning, the Commission has found that agency adverse actions were not warranted where the employee had been previously disciplined for the same offense.

[4] Clarence Weahkee, Federal Employee Appeals Authority, United States Civil Service Commission, Dallas Field Office, Dallas, Texas (Decision dated May 6, 1976).

kowski was not, on the other hand, punished for tape recording the incident in violation of EEOC Order No. 165 by her July 25 letter. That letter did not purport to be based on her illicit recording, and Mr. Jeffrey was not even aware of the tape recording at the time he issued the letter.

All of the grounds of the proposed adverse action were also grounds for the July 25 letters of warning except, in Mr. Perry's case, those involving the October incident, and in Mrs. Falkowski's case, those arising from the October incident and her tape recording of the July 18 incident. These are the only grounds, therefore, on which adverse actions may be based.

The court finds that, though the decision to process adverse action against Mr. Perry was motivated by retaliation, the decision to proceed against Mrs. Falkowski was not retaliatory.

Mrs. Falkowski claims that the present proposal is in retaliation for bringing suit in 1974 to obtain a transfer to Birmingham and for bringing the present action.

Retaliation is made an unlawful employment practice by 42 U.S.C. §2000e-3 (a). To show that the proposed adverse action is improper, Mrs. Falkowski would have to show only that retaliation for engaging in protected activity was a factor in the decision to proceed against her. *United States v. Hayes International Corporation*, 7 E.P.D. ¶ 9164 (N.D. Ala. 1973), affirmed per curiam 507 F.2d 1279 (5th Cir. 1975); EEOC Compliance Manual, Paragraph 491.5 (4). To make out a prima facie case of retaliation, she must show that the attempted discipline followed protected activities of which her employer was aware, and, absent other evidence of retaliation, that the attempted discipline followed the protected activities

closely enough in time to justify the inference of retaliatory motivation. The burden would then shift to the EEOC to show legitimate nondiscriminatory reasons for the discipline. *Aguirre v. Chula Vista Sanitary Service*, 542 F.2d 779 (9th Cir. 1976); *Grant v. Bethlehem Steel Corporation*, C.A. No. 76-Civ. 847 (S.D. N.Y. 1977); *Hochstadt v. Worchester Foundation*, 425 F. Supp. 318 (D. Mass. 1976).

Mrs. Falkowski failed to make out a prima facie case. Though she engaged in protected activity and was subsequently disciplined, the present adverse action did not so closely follow her protected activity as to justify an inference, without more, of causation. Neither has other evidence established a retaliatory motive. Mrs. Falkowski made much ado at the hearing about the EEOC's failure to process properly the numerous grievances she filed against Mr. Perry.The EEOC's shortcomings in this regard are a mere side issue, not evidence of retaliation. The agency acted, though not in accordance with its regulations, in an understandably human way which was not in the least retaliatory.

Even if Mrs. Falkowski had made out a prima facie case of retaliation, still she would not have prevailed. The reasons for the proposed adverse action are legitimate and nondiscriminatory. Tape recording Mr. Perry's outburst without his permission was a clear violation of EEOC Order No. 165. Though it may have been, at best, an attempt, born of desperation and conceived of righteousness, to trap her constant rival, it was yet a violation of agency regulations which the EEOC has the right to vindicate. Her behavior on October 17 is better characterized as the fit of a raving maniac than the reasonable reaction of a competent district office director to a reasonable mistake. Again, the EEOC has the right to censure

such behavior, and its attempt to do so in the instant case is both legitimate and non-discriminatory.

Mr. Perry's, on the other hand, is a different case. He claims that the present petition is in retaliation for his bringing this action and for his vocal objection to the BIDO's lack of management. The court agrees with him.

The only basis proposed for the adverse action against Mr. Perry which the EEOC could technically raise is his part in the October 17 sanitizing incident. This charge boils down to nothing. It is frightening to think that the Civil Service Board would discipline an employee for countermanding the orders of a wild, screaming woman in a fit of hysteria. The very frivolity of this charge bespeaks the improper motivation behind it.

During the hearing on the present petitions, an offer of proof was made of a transcript of the July 18 tape recording, and the contents thereof. Mr. Perry objected to the introduction of the evidence, and the court reserved ruling on its admissibility. For two reasons, the court now holds that the evidence is irrelevant to Mr. Perry's case, and, therefore, inadmissible: first, the EEOC may not proceed against Mr. Perry for his part in the July 18 incident; and, second, even if the EEOC could proceed against Mr. Perry for his part in the July 18 incident, the tape recording and the fruits thereof would not be admissible at that hearing.

Mrs. Falkowski, in taping the conversation with the admitted purpose of obtaining evidence on which to base an adverse action against Mr. Perry, was acting in her capacity as agent for the EEOC and in clear violation of EEOC Order No. 165, Paragraph 6 (b). The EEOC cannot take advantage of its own wrongdoing. The EEOC Compliance Manual, §494.3, prohibits use, in its own case

processing, of evidence obtained by improper means. This principle is a sound one from which the EEOC will not be allowed to deviate. The transcript would not be admissible against Mr. Perry at the administrative level, and is therefore irrelevant to this petition to proceed against him. *Knoll Associates, Inc. v. FTC,* 397 F.2d 530 (7th Cir. 1968); *EEOC v. Red Arrow,* 392 F. Supp. 64 (E.D. Mo. 1974).

Defendants cite *United States v. Janis,* 428 U.S. 433, 96 S. Ct. 3021, 49 L.Ed. 2d 1046 (1976), for the general proposition that the taint of illegal procurement does not prevent evidence's admissibility in a civil setting. Though the *Janis* doctrine is undeniably the law, it has no application to the present proceedings. *Janis* upheld a tax assessment based on illegally seized evidence. The Supreme Court took pains to point out, however, that its holding was premised on the absence of federal participation in the seizure. In the present case, however, Mrs. Falkowski was acting in her capacity as agent for the EEOC, providing the essential element of federal participation. The doctrine that the federal government should not be permitted to avail itself of its own wrongdoing is yet good law.

The evidence is overwhelming that the proposed adverse action against Mr. Perry is in retaliation for the exercise of his first amendment rights.

Mr. Perry's obtaining the preliminary injunction in the instant case was an embarrassment to the EEOC, as well it should have been. Mr. Golub testified to that effect and to the effect that it was embarrassing to him personally.

The court is impressed by the similarity of the Commission's treatment of Mr. Perry and that of one Jim Nunes. Mr. Nunes conducted an audit of the EEOC in

which he recommended the removal of Mr. Golub. Mr. Nunes was thereafter transferred from a field office to the Office of Systemic Programs in headquarters in Washington. Mr. Golub testified, with unmistakable satisfaction, that Mr. Nunes was a GS-14 before he was transferred and has not since been promoted. Ronald Dickerson, a supervisor in the Office of Government Employment in headquarters, testified, in deposition, that Mr. Golub stated that Mr. Perry was "aggressive or forward for a black man." Though Mr. Golub denied making the statement, the court finds the testimony of Mr. Dickerson more credible. The court did not hear Dickerson personally, but did so hear the testimony of Golub.

The treatment Mr. Perry has received is typical of that of instances documented in "The Whistle Blowers" report. The report found that "employees who have exposed governmental waste and abuse have been fired, transferred, reprimanded, denied promotions, riffed, or harrassed through the misuse of formal discipline procedures."[5] Though Mr. Golub testified that he decided to remove himself from the BIDO situation, the evidence discloses that his removal was more apparent than real and raises the inference that it was he, or someone at his instance, who decided to process the instant adverse action against Mr. Perry, and that it was not Mr. Jeffrey as the defendants would have the court believe.

The decision to process the proposed adverse actions was based in large part upon the results of an investigation of the BIDO made by Mr. Krueger and Ms. Garcia.

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[5] *The Whistle Blowers – A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse and Corruption*, page 1 (Senate Committee on Governmental Affairs, 95th Congress, 2nd Session, February 1978).

These two were selected by James Packwood and Cora Dixon, Mr. Golub's assistants. Mr. Packwood attended the Chicago meeting at which the Krueger-Garcia investigation was planned. Both Mr. Krueger and Ms. Garcia were advised of the proposed investigation by headquarters in Washington, not by Mr. Jeffrey. When the investigation was complete, the report was delivered to Mr. Jeffrey in Washington; both Packwood and Dixon were present at the delivery. Mr. Jeffrey testified that he read only the first of the four volumes comprising the report. Mr. Golub, on at least one occasion, personally called Mr. Krueger to inquire about the investigation. Mr. Golub later presided at the May 1978 meeting where the decision to propose a transfer instead of a removal was made. Mr. Jeffrey's file was devoid of drafts and other materials that would have been present had he drafted the proposed adverse action. Mr. Jeffrey even testified that he didn't know when the decision to discharge Mr. Perry was made and that the adverse action was typed in Washington prior to the October meeting at which Mr. Jeffrey learned of the decision to proceed against Mr. Perry. Further, it is undisputed that Mr. Golub issued instructions to personnel in headquarters not to inform Mr. Perry of the activities occurring there.

It is obvious that Mr. Jeffrey did not make the decision to proceed against Mr. Perry, and it is equally obvious that it was Mr. Golub who made the decision. The only plausible reason that defendants would try to hide the origin of the proposed adverse action is that it would be easier to hide the retaliatory motive behind it if it looked as if it had come from Mr. Jeffrey instead of Mr. Golub.

On February 25, 1977, Maxine Cade, the Director of EEOC's own EEO office, issued a proposed disposition of Mr. Perry's complaints of discrimination and reprisal. The

proposed disposition found that, while Mr. Perry had not been discriminated against on the basis of race or sex, he had been subjected to retaliation by the EEOC on account of his protests of mismanagment.[6]

If the EEOC were concerned, as the proposed adverse actions would indicate, with promoting the efficiency of the service, then it would, logically, have investigated the finding of retaliation further. Instead, the proposed decision was rescinded after what Mr. Golub's answers to interrogatories characterize as his "discussions among a group of persons." This was the first time in the history of the EEOC that a proposed decision was rescinded. In every prior case, the proposed decision was adopted as final. The Executive Director's Office's review of the decision was also novel. Despite the rescission, Ms. Cade, on September 30, 1977, adopted the proposed disposition as the agency's final decision under her authority as director of the office and pursuant to EEOC Order No. 577, which gives her such authority. The decision was final but a short while. On November 30, 1977, after Mr. Perry relied upon the finding of retaliation in defense of the present petition, headquarters withdrew the decision. Despite the fact that the Civil Service Commission's regulations provide that an EEO complaint shall be processed before 180 days after it is filed,[7] Mr. Perry's case before the EEOC's EEO office remains, to this day, unresolved.

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[6]That proposed disposition contained the following language: "Much of your protests regarding the definition of your duties, the work assignments given you, and your concern about irregularities in the Birmingham District Office are valid and are recognized as such by the Equal Employment Opportunity Commission." * * * "The investigation and evidence of record shows that your protests resulted in a decision made by a person or several persons to remove you from your position as Deputy Director of the Birmingham Office." * * * "The investigation shows that adverse actions were taken and/or attempted against you because of your persistence in making known irregularities in the Birmingham District Office. Through your persistence you have brought into focus serious managerial problems which exist in the Birmingham District Office and you have attempted to avail youself of remedies through official channels. As a result you have been subjected to many adverse actions."

[footnote continued]

By EEOC Order No. 572, each employee is to be given an annual performance appraisal. Until Mr. Perry went to the United States Attorney complaining of the BIDO situation, he had received outstanding appraisals each year. From 1976 until November 1977, Mrs. Falkowski gave him no appraisal at all. The admitted reason for this violation of procedure was to withhold potential ammunition for the present proceedings.

One of the earmarks of retaliation is disparate treatment. *McDonnel Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); EEOC Compliance Manual §495.3. It is obvious from a review of the EEOC's treatment of other cases of misconduct that the charges against Mr. Perry constitute excuses rather than reasons. The evidence revealed that gross incompetence and neglect of duty in the Memphis District Office was rewarded by promotions for three of the managers responsible. Destruction of records in the Chicago District Office to create the impression of a decreased backlog was ignored. The Krueger-Garcia report revealed instances of supervisor Charles Davis's misconduct, for which Mr. Davis received a mere "counseling memo." These included his shouting obscenities at Mrs. Falkowski, usurping her authority, refusing to communicate with Mrs. Falkowski, and his daring Mrs. Falkowski to do anything

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[7]29 C.F.R. §713.220 (a).

about his low productivity. Though Mr. Jeffrey grossly misstated his educational qualifications when he filled out his executive inventory for the EEOC, no action is proposed regarding his misconduct, and Mr. Golub even testified that Mr. Jeffrey had done nothing wrong.

Perry's Exhibit 28 reveals a fifteen-day suspension of a district director for failure to follow instructions, falsification of records, continued falsification of records after warning, and verbal abuse; a thirty-day suspension for falsification of time cards to the tune of $4,132.27; a thirty-day suspension for falsification of travel vouchers to the tune of $3,747.00; a one-day suspension for assaulting a supervisor, and so on.

The issue in a case of disparate treatment is not one of precise equivalence in culpability but of incidence of comparable seriousness attended by lesser discipline. *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976). Clearly incidents at least comparable in seriousness to those with which Mr. Perry is charged have been met with much lighter discipline than that proposed against Mr. Perry. The disparate treatment indicative of retaliation is present in Mr. Perry's case.

The defendants' decision to seek a mere transfer instead of removal makes the proposed discipline no less retaliatory. Apparently there is little difference in substance between the proposed transfer and removal. The EEOC would, if permitted, transfer Mr. Perry to the Office of Systemic Programs under the direct supervision of Mr. Golub. Mr. Perry's proposed job description was drafted after the defendants amended their petition to seek a transfer instead of removal. Mr. Golub was not even sure of the name of the position, referring to it at first as "equal opportunity specialist" and later as "equal

employment officer." The job description referred to the position sometimes as "equal opportunity specialist" and sometimes as "special assistant." The duties which Mr. Perry would assume consist of reviewing consent decrees, and, as Mr. Golub added at the hearing, reviewing conciliation agreements. The function of the Office of Systemic Programs is to attack systems of discrimination. It is apparent that the duties thought up for Mr. Perry would be only tangential to the office's function.

The transfer would constitute a reduction in rank under the terms of the Federal Personnel Manual because Mr. Perry would no longer be in a supervisory position. The EEOC would propose, thus, to waste Mr. Perry's talents in the name of promoting the efficiency of the service. What the EEOC does cannot be reconciled with what it says. It can be reconciled only with an underlying retaliatory motivation.

The office to which the EEOC proposes to send Mr. Perry is not matched to his abilities, but rather to his intolerance of an inefficient Commission. The office is a depositary for dissidents, the Siberia of the jealous guardians of our civil rights. Jim Nunes, the man who recommended Mr. Golub's removal, was, thereafter, transferred to that office. Similarly, Mr. Perry would be going to work with Marvin Rogoff, an American Federation of Government Employees officer and outspoken critic of EEOC management. Certainly, Mr. Golub does not want these men under his direct supervision out of love for them. The logical inference is that he wants these people in positions where he can more easily silence them.

The evidence is overwhelming that the adverse action was proposed against Mr. Perry because of his protests of mismanagement and inefficiency, in violation of his right to speak freely. Further, it is clear that had Mr. Perry not

exercised his rights to protest conditions in the EEOC, this petition would not have been filed. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Accordingly, the defendants' petition for persmission to process adverse action against Mr. Perry is due to be denied.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1719

[Filed: May 29, 1979]

BERTRAM N. PERRY,
Plaintiff-Appellee,

v.

ALVIN GOLUB, Et Al.,
Defendants-Appellees,

EVELYN FALKOWSKI,
Movant-Appellant.

* * *

No. 77-1865

EVELYN FALKOWSKI,
Plaintiff-Appellant,
Cross-Appellee,

v.

LOWELL PERRY, Chairman, ETC., ET AL.,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Alabama

ON PETITION FOR REHEARING

(May 29, 1979)

Before WISDOM, CLARK and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

APPENDIX E

DO NOT PUBLISH

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1719

BERTRAM N. PERRY,
Plaintiff-Appellee,

v.

ALVIN GOLUB, ET AL.,
Defendants-Appellees,

EVELYN FALKOWSKI,
Movant-Appellant.

No. 77-1865

EVELYN FALKOWSKI,
Plaintiff-Appellant
Cross-Appellee,

v.

LOWELL PERRY, Chairman, ETC., ET AL.,
Defendants-Appellees
Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Alabama

(April 25, 1979)

Before WISDOM, CLARK and FAY, Circuit Judges.

PER CURIAM:

The district court correctly dismissed these actions without prejudice on account of mootness. The effect of such dismissals was to vacate all underlying proceedings in each case so as to spawn no consequences. The adjudication of mootness eliminated all pending controversies and left the court without jurisdiction to enter those portions of the injunction orders restricting future actions of the parties in either case. The orders of dismissal, without prejudice, are affirmed but the "protective orders" or injunctions are vacated.

AFFIRMED and VACATED.

APPENDIX F

BERTRAM N. PERRY,
Plaintiff,
v.
ALVIN GOLUB, *et al.*,
Defendants.

Civ. A. No. 75-G-1476-S

United States District Court,
N.D. Alabama, S.D.

Nov. 30, 1976.

Employee of Equal Employment Opportunity Commission brought action challenging his permanent reassignment, in which defendants filed a "Petition for Permission to Process Adverse Action Against" plaintiff. Plaintiff moved to dismiss or strike petition for defendants' failure to comply with order to produce documents. The District Court, Guin, J., held that defendants' failure to file timely objection constituted a waiver of objection that documents were irrelevant and privileged, that dismissal of the petition was an appropriate sanction for refusal to comply with production order since, among other things, the failure was wilful, notwithstanding contention that plaintiff was not prejudiced, that dismissal was not precluded by rule providing that a default judgment may not be entered against the United States unless the claimant establishes his right to relief by satisfactory evidence and that although there was no longer an actual existing controversy the court would retain jurisdiction to protect plaintiff against recurrence of allegedly retaliatory actions.

Defendants' petition dismissed; jurisdiction retained.

See also, D.C., 400 F. Supp. 409.

William F. Gardner, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, Ala., for plaintiff.

Edward H. Levi, Atty. Gen., John J. Pagano, Office of Gen. Counsel, Equal Employment Opportunity Commission, Washington, D.C., Joseph L. Battle, Huntsville, Ala., Margaret A. Beller, Washington, D.C., Edward Still, Birmingham, Ala., Nicholas M. Inzeo, II, Equal Employment Opp. Comm., Washington, D.C., for defendants.

ORDER

GUIN, District Judge.

This cause came on for hearing before the Court on November 22, 1976 on the plaintiff's Rule 37 (b) motion to dismiss or strike the defendants' "Petition for Permission to Process Adverse Action Against Bertram Perry." At the same time, the Court has considered the question of the extent to which there remains an actual controversy in this case. Based on the factual circumstances here present, the Court finds as follows:

I.

RULE 37 (b) MOTION

A. FACTS:

The facts relative to this subject are the following:

1. On September 20, 1976, the defendants filed their "Petition for Permission to Process Adverse Action Against Bertram Perry." On the same day, the Court held a conference with counsel for the plaintiff and defend-

ants and set the Petition for hearing on the earliest open date, which was November 22, 1976.

2. On September 23, 1976, the plaintiff filed a Request for Production of Documents under Rule 34 with reference to the defendants' Petition.

3. On October 8, 1976, which was the date set for the production of the documents, the plaintiff's attorney telephoned the defendants' attorney to inquire whether the documents would be produced that day. The defendants' attorney replied that it would be another ten days before the documents would be ready, and the plaintiff's attorney agreed that this would be satisfactory. (The contention that the defendants' attorney understood from this conversation "that no strict deadlines were required" is true only to the extent of the plaintiff's agreement to another ten days for the production of documents).

4. After the documents were not produced within this period, the plaintiff filed a motion to compel production. Since the defendants' Petition was set for hearing on November 22, 1976 and the documents were needed without delay for the plaintiff's preparation for the hearing, the Court took immediate action on the plaintiff's motion. Accordingly, by Order entered on October 26, 1976, the Court ordered the production of the documents by November 1, 1976.

5. On November 3, 1976, the defendants filed with the Clerk of the Court their "Answer to Request for Production of Documents" stating that certain of the documents were being produced but refusing to produce the documents called for by Paragraph 5 of the Request for Production on the asserted grounds that such documents were irrelevant and privileged. On the same date, the defendants filed a motion for protective order against the production of these documents.

6. On November 4, 1976, the Court cancelled the hearing on the defendants' Petition and set for hearing on November 22, 1976 the plaintiff's motion under Rule 37 (b) for the dismissal or striking of the Petition and any other discovery motions which might be pending.

7. The documents which were produced by the defendants were produced on November 3rd and 8th.

8. The defendants only partially complied with other paragraphs of the Request for Production. With respect to Paragraph 2, which requested all documents as to all adverse actions proposed or initiated by the EEOC from 1965 to the present, the defendants produced, on November 8, 1976, copies of "Standard Form 50" giving notice of adverse actions, but none of the underlying documentation was produced. With respect to Paragraphs 3 and 4, which requested all documents containing proposals for adverse actions and complaints or requests for investigation as to EEOC employees, the defendants produced no documents on the asserted ground that no such files were maintained. At the hearing, it developed that the documents requested by Paragraphs 2, 3, and 4 do exist but are maintained in various EEOC offices and that the defendants had taken steps to collect the documents, although none have been produced.

9. Until the November 22nd hearing, the defendants' position was that the documents called for by Paragraph 5 of the Request for Production would not be produced. At the hearing, the defendants announced that while they still objected to the production of the documents if the Court so ordered.

10. On the same day, however, the defendants sought to attach certain conditions to production of the documents. By letter dated November 22, 1976 and written

after the close of the hearing, counsel for the defendants asked that the Court place the following restrictions on the production of the documents:

"1. Disclosure limited to Counsel for Plaintiff Bertram Perry.

2. No reproduction of the 'Audits' without the specific authorization of the Court or Counsel for the EEOC.

3. Counsel should be prohibited from discussing the contents of the 'Audits' with Plaintiff or anyone else."

B. ANALYSIS:

1. Effect of the failure to file a timely objection:

It is clear that the defendants' failure to file timely objections to the Request for Production constituted a waiver of the objections. E.g., *United States v. 58.16 Acres of Land,* 66 F.R.D. 570 (E.D. Ill. 1975) ("an objection that the information sought is privileged, is waived by a failure to make it within the proper time limits"); *Davis v. Romney,* 53 F.R.D. 247 (E.D. Pa. 1971) ("If discovery rules are to have 'any effect or meaning, the failure to serve such objections within the time prescribed * * * should be considered a waiver of such objections' "); *American President Lines v. Hartford Fire Insurance Co.,* 55 F.R.D. 61 (E.D. Pa. 1971). Similarly, the defendants' protective order motion does not alter the situation, since Rule 34 required that the point be raised by timely objections. As Professor Moore says, "The party served with the request must respond to it within the time limits set forth in the Rule, or object, stating the reasons for the objection." 4A *Moore's Federal Practice* ¶ 37.02, page 36-37 (2nd ed. 1975).

2. Criticism of the Court's Order:

It is argued that the defendants' failure to file timely objections should be excused on the theory that the Court was in error in entering the Order on October 26, 1976 requiring the production of the documents without prior notice to the defendants. The Court finds this argument to be utterly lacking in merit for the following reasons:

To begin with, the argument is irrelevant to the defendants failure to file timely objections. The defendants made no effort to file any objection before October 26th when the Order was entered, and the Order itself did not prohibit the defendants from filing an objection. It is obvious that the Order had nothing to do with the failure to file timely objections and that the defendants are wide of the mark in seeking to excuse their failure to object by criticizing the Order.

Moreover, the defendants' criticism of the Order disregards the circumstances in which it was entered. When the Court met with counsel for the plaintiff and defendants on September 20, 1976, it was pointed out that the defendants had not responded to the plaintiff's initial Interrogatories and Request for Production filed on March 22, 1976, some six months earlier. At the same conference on September 20th, the plaintiff stated that he would file Interrogatories and a Request for Production addressed specifically to the defendants' Petition, and the Court asked the defendants to answer them as soon as possible in view of the defendants' request for an early hearing on the Petition. The Court was also aware that the documents sought by the Request for Production were considered by the plaintiff to be critical to his defense against the Petition and that when the October 26th Order was entered, less than a month remained before the hearing. It is settled that "A party to an action has the right to have the benefits of discovery procedure

promptly, not only in order that he may have ample time to prepare his case before scheduled trial, but also in order to bring to light facts which may entitle him to summary judgment or induce settlement prior to trial." *United States v. Continental Casualty Co.*, 303 F.2d 91 (4th Cir. 1962). Given the circumstances which existed in this case, the Court was clearly entitled to enter the Order immediately.

It is also argued that the order came before the expiration of the period for the filing of the defendants' response to the Production Request. But the facts are that the defendants had until October 26th to file a response and did not do so.[1] Moreover, the event which led to the motion to compel production was the fact that the defendants did not carry out their representation of October 8th that the documents would be produced in 10 days.

3. The appropriate sanction:

Rule 37 (b) provides that "If a party – fails to obey an order to provide or permit discovery, – the court in which the action is pending may make such orders in regard to the failure as are just", including "An order striking out pleadings" and "dismissing the action or proceeding or any part thereof". It is well settled that the appropriate sanction is to be determined in the context of the particular facts of the case, with the Court's discretion guided by the standard of the sanction which is just in light of the facts.

It should initially be said that this is not a case in which a party attempted in good faith to comply with a

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[1] The Production Request was filed and served on September 23rd. The defendants were entitled to an additional 3 days under Rule 6 (e), and the 33 days expired on October 26th. Under Rule 5 (b), the defendants' response was deemed served on November 1st.

Court order but was unable to do so because of circumstances beyond its control. E.g., *Societe Internationale v. Rogers,* 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) ("petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control"); *Dorsey v. Academy Moving & Storage, Inc.,* 423 F.2d 858 (5th Cir. 1970) (plaintiff's failure "was due to inability fostered neither by its own conduct nor by circumstances within its control"); *Bon Air Hotel v. Time, Inc.,* 376 F.2d 118 (5th Cir. 1967) ("This record compels the conclusion that petitioner's failure to comply was due to inability brought about neither by its own conduct nor by circumstances within its control").

In this case, the plain fact is that after filing the out-of-time objection, the defendants flatly refused to comply with the Court's Order. Compare *United States v. Wright Motor Co.,* 536 F.2d 1090 (5th Cir. 1976) (dismissal for refusal to answer deposition questions); *Romari v. United States,* 531 F.2d 296 (5th Cir. 1976) (dismissal for refusal to answer deposition questions); *United States v. Cotton Valley Operators Committee,* 9 F.R.D. 719 (W.D. La. 1949), aff'd by equally divided Court, 339 U.S. 940, 70 S. Ct. 793, 94 L. Ed. 1356 (1950) (dismissal based on Government's refusal to produce documents based on claim of privilege); *United States v. National Broadcasting Co.,* 65 F.R.D. 415 (C.D. Cal. 1974) appeal dismissed, 421 U.S. 940, 95 S. Ct. 1668, 44 L. Ed. 2d 97 (1975) (dismissal where "the government has voluntarily chosen not to comply with the Court's orders"); *Black v. Sheraton Corp.,* 371 F. Supp. 97 (D.D.C. 1974) (facts taken as established against the United States based on refusal to produce documents).

The defendants argue that because they expressed a willingness to produce the documents called for by Paragraph 5 of the Production Request at the November 22nd hearing (disregarding for the moment the defendants' post-hearing request for the imposition of conditions on production), the sanction of dismissal should not be applied. The Court has given careful consideration to this point and has concluded that in the factual circumstances of this case, the defendants' belated offer to comply does not make a lesser sanction appropriate and that the dismissal of the Petition is the appropriate sanction. The Court bases this conclusion on the following facts:

(a) The defendants' eleventh hour offer does not alter the fact that they willfully refused to comply with the Court's Order. At best, it is an effort to escape the consequences of non-compliance by offering to do what they were ordered to do almost a month ago. In similar circumstances, the Courts have not viewed such last-minute changes of position with favor, and neither does this Court. Compare *Kelley v. United States,* 338 F.2d 328 (1st Cir. 1964), in which the plaintiff failed to comply with the Court's Order to answer interrogatories, and the action was dismissed. The plaintiff then offered the answers to the interrogatories and moved for reconsideration of the dismissal. The District Court denied the motion to reconsider, and the Court of Appeals stated as follows in affirming:

> "The sole argument made is that the order was too strict in this case, and that a fine on counsel, or a taxing of costs, would have been enough. We are not in sympathy with this suggestion. In the conduct of his case, acting for what he surely thought would be to the best interests of his client, counsel for libellant (not counsel on this appeal) deliberately disregarded the court's order, and by a calculated maneu-

ver sought to obtain an improper advantage. If this had worked out it would, at least in counsel's opinion, have helped libellant's cause. Now, when it backfired, he wants to take a slap on the wrist and start over. We refrain from further comment."[2]

(b) The Court finds that the defendants deliberately disregarded the Court's Order and that the dismissal of the defendants' Petition is not only appropriate but essential to maintain the integrity of the orders entered by the Court. At the hearing, the defendants argued that the plaintiff was not prejudiced by the refusal to comply since he still holds his position of Deputy Director of the Birmingham Office and that the only prejudice to the plaintiff's attorney was the time he spent in the preparation of the Rule 37 motion and in attending the hearing. However, the refusal of a party to a Federal Court lawsuit to comply with an Order of the Court cuts substantially deeper than the question of prejudice to litigants and their attorneys. A basic tenet of our government of law is that a party is required to obey a Court order. After having refused to comply with the Court's Order, the defendants now ask for a light sanction by agreeing to do what they were ordered to do almost a month ago. An order of a Court is not to be treated so lightly. Compare *Norman v. Young,* 422 F.2d 470 (10th Cir. 1970), in which the Court pointed out in affirming the entry of default judgment for the defendants' failure to produce documents as required by Court Order that:

[2]See also *Bon Brimer v. Whirlpool Corp.*, 362 F. Supp. 1182 (N.D. Cal. 1973), in which the Court stated that "this Court finds that the failure of plaintiffs to come forward with this and other documents until literally the eve of trial to have been a willful failure to comply, and accordingly, will exclude Plaintiffs' Exhibit 6."

"[T]he Normans' failure to produce the requested papers was willful. It was more than intentional; it was a direct flaunting of the Court's authority."

Moreover, the public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders. Regrettably, as this case once again demonstrates, Governmental agencies too often set the contrary example of resistance to discovery. Day in and day out, counsel for private litigants routinely exchange documents, frequently without a request for production being filed, while some Governmental agencies seem to take the attitude that their files are for their use only.[3] This Court has previously had occasion to invoke a Rule 37 sanction for the refusal of a Governmental agency to respond to discovery, *United States v. Wright Motor Co.,* supra, and it takes this opportunity to remind Governmental agencies with cases in this Court that the discovery rules and the Court's discovery orders are to be complied with.

(c) The Court is of the opinion that in the circumstances of this case, no lesser sanction would be an effective remedy for the defendants' disregard of the Court's Order.

A resetting of the hearing on the Petition would be more of a penalty to the plaintiff and the Court than it

[3]Compare *EEOC v. Los Alamos Constructors,* 382 F. Supp. 1373 (D. N.M. 1974), in which the Court commented that:

"Those unfortunate enough to be forced into litigation with the government still face agency insistence on trial by ambush, although, as we will see presently, Congress and the courts agree that a recognition of governmental privilege is the rare exception, while full disclosure is the almost universal rule."

would to the defendants. The plaintiff would be required to renew his preparation for the hearing, including the contracting of witnesses residing outside the State who were released when the hearing was cancelled. Similarly, the Court would be required to find another date on its already overburdened docket. When the defendants filed their Petition on September 20, 1976, they asked the Court to set the hearing at the earliest possible date, and the Court complied by giving the defendants the very first open date on its docket. In view of this fact, the defendants cannot reasonably suggest that their failure to comply with the Court's Order should result in nothing more than a rescheduling of the hearing.

So also, the sanction of a fine for contempt would accomplish nothing of any substance. It would be paid by the EEOC, and the cost would ultimately fall on the taxpaying public.

In sum, the observations of the Court in *G-K Properties v. Redevelopment Agency of City of San Jose*, 409 F. Supp. 955 (N.D. Cal. 1976), express this Court's view of the issue here. In that case, the Court pointed out that the dismissal of the action was the appropriate sanction "to protect the integrity of its orders" and that:

> "A continuance of the trial date is simply no sanction at all. – To grant another continuance would in effect be a sanction against the Court because of the disruptive effect on the Court's calendar. Nor would fines be adequate. Plaintiffs have house counsel familiar with litigation who read the plain and unambigous language of the Court's order of October 28, 1975, calling for obviously relevant material. To disregard that order, for reasons known only to plaintiffs, is a willful act which threatens the integrity of the judicial process. Imposing a fine under these circumstances would introduce into litigation a sporting chance theory encouraging parties to withhold vital information from the other side with the hope that the withholding may not be discovered and, if so, that it would only result in a fine."

(d) Both the Supreme Court and the Fifth Circuit Court of Appeals have recently emphasized the importance of effective Rule 37 sanctions in order to deter others from similar conduct. In *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976), the Supreme Court agreed with the District Court's sanction of dismissal for failure to comply with an order to answer interrogatories and stated as follows in so holding:

> "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts."

So also in *Emerick v. Fenick Industries, Inc.*, 539 F. 2d 1379 (5th Cir. 1976), our Court of Appeals pointed out:

> "Although we could infer that, following imposition of a more lenient sanction, the chastened appellant might have complied with the district court's orders, the Supreme Court has emphasized the deterrent aspect of Rule 37 (b) (2) sanctions."

This consideration has a particularly compelling application in the circumstances of this case. The Equal Employment Opportunity Commission has been given the authority by Congress to institute lawsuits under Title VII of the Civil Rights Act in carrying out its important task of promoting equality in employment, and the Courts are directed by the statute to expedite the processing of Title VII cases. It is apparent that if the EEOC were to be given only a slap on the wrist in this case, such action might well encourage defendants sued by the EEOC to delay in responding to the EEOC's discovery requests and to argue that the sanction for disregarding discovery rules and Court orders should be no more than that here given to the EEOC. The net result would be delays in the processing of Title VII cases and a proliferation of discovery disputes on the Court dockets.

This case is but a grain of sand in comparison to the ever-increasing volume of Title VII cases and the high degree of importance inherent in effectuating the goal of equal employment opportunities. To create the potential that this case might result in evasiveness and delays by defendants in responding to discovery in suits filed by the EEOC would most assuredly be an effort of substantial magnitude. The sanction of dismissing the Petition is eminently appropriate "to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club,* supra.

(e) While the defendants represented to the Court at the hearing that the documents would be produced "if ordered by the Court", this representation was soon modified by the defendants' post-hearing letter asking the Court to attach conditions to the production of the documents.

The defendants' post-hearing letter is revealing of their cavalier attitude toward the discovery rules and this Court's Order. It contains the statement that the requested conditions should be imposed "Should the Court decide to grant Plaintiff's Request for Production". At this late hour, the defendants speak in terms of the result if the Court grants the plaintiff's Request for Production, when the facts are that Rule 34 was amended in 1970 to eliminate the procedure of a motion and order to produce,[4] that it was the obligation of the defendants to file timely objections to the Request for Production if they did not intend to comply with it, and that the Court ordered the production of the documents almost a month ago.

Moreover, the conditions which the defendants would have the Court attach to the production of the documents would have been inappropriate even if they had been advanced in a timely fashion. The conditions "Disclosure limited to Counsel for Plaintiff Bertram Perry" and "No reproduction of the 'Audits' without the specific authorization of the Court or Counsel for the EEOC" could be interpreted as prohibiting the use of the documents as evidence, which would remove a principal value of documentary discovery. Similarly, the condition "Counsel should be prohibited from discussing the contents of the 'Audits' with Plaintiff or anyone else" would have the manifestly unreasonable result of prohibiting the plaintiff's attorney from discussing the contents of the documents with his own client in preparation for trail. The fact that the defendants advanced these requested conditions long after the expiration of the period for the filing of objections and after they had

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[4] 8 Wright and Miller, *Federal Practice & Procedure* §2207 (1970).

represented to the Court at the hearing that the documents would be produced is further evidence of the defendants' intransigent conduct in responding to discovery and in complying with the Court's Order. Compare *Sperandeo v. Milk Drivers & Dairy Employees Local Union No. 537,* 334 F.2D 381 (4th Cir. 1964), in which the plaintiff agreed to produce the documents in camera on the condition that he could reserve the right to dismiss if the Court ruled the documents could be produced in open court. In affirming the dismissal of the action, the Court stated that:

> "At the outset, we deem the appellant's conditional offer to abide the court's order for an in camera examination of the documents as tantamount to a refusal to comply with that order and it will be so considered. Such an order cannot be conditionally accepted by a governmental agency, or the head thereof, any more than it could be so accepted by any private litigant."

(f) The sanction of dismissing the Petition is mild by comparison with the sanctions which are set forth in Rule 37(b) and which have been applied by the courts. It entails neither the dismissal of an action, nor the entry of default judgment, nor taking allegations as established facts. All that it means is that the defendants will not be allowed to initiate the proposed adverse action set forth in the Petition. This sanction is clearly no more severe than that called for by the facts of this case.

(g) The defendants' refusal to comply with respect to Paragraph 5 of the Request for Production is compounded by the fact that the defendants produced only part of the documents requested by Paragraph 2 of the

Production Request and did not produce any of the documents requested by Paragraphs 3 and 4.[5]

Accordingly, based on all these facts, the Court finds that the dismissal of the defendants' "Petition for Permission to Process Adverse Action Against Bertram Perry" is the appropriate sanction for the defendants' failure to comply with the Court's Order.

4. Effect of Rule 55:

Although it was not raised by the defendants, the Court has considered whether the application of this sanction might be prohibited by the provision of Rule 55 that a default judgment may not be entered against the United States unless the claimant establishes his right to relief by evidence satisfactory to the Court. The Court concludes that Rule 55 does not preclude the sanction of dismissing or striking the Petition. This sanction will not result in any default judgment but only in the dismissal or striking of the Petition for Permission to Process Adverse Action. Moreover, the defendants assumed the position of a moving party in filing the Petition, and the United States is subject to the sanction of dismissal under Rule 37(b). 4A *Moore's Federal Practice* ¶ 37.03, page 37-70 (2nd ed. 1975).

II.
EXTENT TO WHICH AN ACTUAL CONTROVERSY REMAINS

The Court has carefully reviewed the voluminous file in this case and has concluded in doing so that despite all the sound and fury which it has generated, there is no longer any existing actual controversy at the present time.

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[5]The defendants' failure to produce these documents could have led to the imposition of sanctions in accordance with Rule 37 (d).

This lawsuit was originally initiated as a result of the efforts of the defendants to remove the plaintiff from his position as Deputy Director of the Birmingham District Office by means of a "detail". Since then, however, the detail has been withdrawn. Similarly, since there is no presently existing effort to remove the plaintiff, the allegations of the amended complaint no longer present a viable actual controversy.

The Court recognizes the desire to defendant Falkowski to use this lawsuit as the vehicle for seeking to vindicate her actions which were the subject of the plaintiff's protests, which in turn led to the effort to remove him from the Birmingham office. The crux of the matter is that she was present and represented by able and experienced counsel at the preliminary injunction hearing on August 29, 1975 and on advice of counsel elected not to testify. Having had second thoughts, she now seeks to give the testimony that she elected not to give more than a year ago. The Court fully understands the considerations which motivate her desire to turn back the clock and provide this testimony, but it is abundantly clear that the Courts cannot try cases and render decisions to satisfy the personal desires of anyone when there is no longer any existing actual controversy.

While the Court finds that there is no longer any actual existing controversy in this case, the Court also finds that it is necessary to retain jurisdiction to protect the plaintiff against a recurrence of allegedly retaliatory actions. The records before the Court demonstrate that there are reasonable grounds to apprehend a resumption of acts of alleged retaliation. This being so, the Court will in the exercise of its discretion retain jursidiction of this case for the purpose of resolving any claims or issues regarding a recurrence of allegedly retaliatory actions against the plaintiff. E.g., *Atlantic Richfield Co. v. Oil, Chemical & Atomic Workers International Union*, 447 F.2d 945 (7th Cir. 1971), in which Judge Stevens pointed out that "If past wrongs have been proved, and the possibility of future misconduct survives, so does the court's power."

C. CONCLUSIONS:

For the reasons set forth above, it is by the Court ORDERED, ADJUDGED, and DECREED as follows:

1. The defendants' "Petition for Permission to Process Adverse Action Against Bertram Perry" be and the same is hereby dismissed and stricken under Rule 37(b) of the Federal Rules of Civil Procedure.

2. The Preliminary Injunction entered on September 11, 1975 be and the same is hereby dissolved.

3. The Court retains jurisdiction of this cause for the purpose of hearing and resolving any claims or issues arising out of any recurrence of allegedly retaliatory actions against the plaintiff subsequent to the entry of this Order.

4. In order to ensure the protection of the plaintiff against any recurrence of the alleged acts of retaliation or discrimination arising from the subject matter of this case, it is hereby ORDERED that in the event the Equal Employment Opportunity Commission or any officer or agent thereof should propose to remove the plaintiff from his position of Deputy Director of the Birmingham District Office or from the Birmingham District Office by any means, including but not limited to a detail or adverse action, based on any act, occurrence, or situation arising hereinafter, such proposal shall not

be initiated, proposed, or implemented unless and until a petition describing such proposal has been filed with this Court and approved after hearing by the Court.

5. The question of costs is reserved for future determination by the Court.

APPENDIX G

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 75-G-1476-S

[Filed: Nov. 23, 1976]

BERTRAM N. PERRY,
Plaintiff,

v.

ALVIN GOLUB, et al.,
Defendants.

ORDER ON PLAINTIFF'S MOTION AS TO PARTIES DEFENDANTS

The Court has before it the plaintiff's motion for the dismissal of the complaint as against defendants Donald L. Hollowell and Evelyn Falkowski on the ground that their presence as parties defendants is no longer necessary and for the substitution, in place of Lowell W. Perry, of Ethel Bent Walsh as his successor as Chairman of the Equal Employment Opportunity Commission. Having examined the motion, the Court is of the opinion that the plaintiff is entitled to dismiss without prejudice as to defendants Hollowell and Falkowski and that Ethel Bent Walsh is due to be substituted in her capacity as Acting Chairperson of the Equal Employment Oppor-

tunity Commission under Rule 25(d)(1) of the Federal Rules of Civil Procedure. It is therefore by the Court ORDERED that:

1. The complaint be and the same is hereby dismissed without prejudice as to defendants Donald L. Hollowell and Evelyn Falkowski. No costs are taxed or allowed.

2. Ethel Bent Walsh, as Acting Chairperson of the Equal Employment Opportunity Commission, be and the same is hereby substituted as a defendant in place of Lowell W. Perry, as Chairman of the Equal Employment Opportunity Commission.

DONE, this the 23rd day of November, 1976.

/s/ _____
United States District Judge

APPENDIX H

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

CA 75-G-1476-S

[Filed: Dec. 2, 1976]

BERTRAM PERRY,
Plaintiff,

v.

ALVIN GOLUB, et al.,
Defendants.

MOTION TO RECONSIDER DISMISSAL

Comes now the Defendant Evelyn Falkowski, by and through her attorney, and moves the Court to reconsider its order dismissing Evelyn Falkowski as a party defendant in the above-captioned matter for the following reasons:

1. The Defendant Falkowski has engaged in a struggle with the EEOC to enforce her right to non-discriminatory employment practices since 1972; she is presently the Plaintiff in the case which has been consolidated with this one, *Falkowski v. Perry*, et al, Civil Action No. CA 76-G-0545-S.

2. Because the Defendant EEOC could not support the action requested by the Defendant Falkowski

against Plaintiff Perry without admitting and largely establishing the discriminatory practices complained of by the Defendant Falkowski, the Defendant EEOC was not and is not in a position to protect the interest of Falkowski.

3. Defendant Falkowski proffers to the Court that Plaintiff Perry is not the competent, conscientious civil servant depicted to the Court in the hearing of his preliminary injunction, but a contentious, non-competent employee who merits separation from federal government employment. This material is annexed hereto and marked "Exhibit A".

4. Defendant Falkowski has at all times pursued her remedies diligently; she has taken depositions at great personal expense of Plaintiff and members of the office supervisory staff tending to disprove the allegations of Plaintiff Perry and support the nondiscriminatory conduct of Defendant Falkowski; at no time has the Defendant Falkowski failed to timely respond to any motions filed by Plaintiff Perry or to abide by any order of this Court.

5. The presence of Defendant Falkowski as a party in this suit creates great hardship to the Plaintiff because of her persistent pursuit of her defense; it appears it would be more convenient for the Plaintiff to avoid the constant exposure of the weakness of his case through the efforts of Defendant Falkowski. The deletion of Defendant Falkowski, over her strenuous objections leaves the Plaintiff free to make unsubstantiated allegations concerning the conduct of Falkowski, allegations which later appear as findings of fact in the public record, without giving her an opportunity to rebut and counter such allegations. At the time of the preliminary injunction, Plaintiff was judged to have established a likelihood

of success on the merits; the findings made in that preliminary injunction, however, did not become irrebutable presumptions nor *res-judicata*. If Defendant Falkowski is dismissed from the suit, she will never have an opportunity to establish the merits of her defense.

/s/ _____
Judge

DENIED
1-14-77

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 76-G-545-S

[Filed: Nov. 30, 1976]

EVELYN FALKOWSKI,
Plaintiff,

v.

LOWELL PERRY, et al.,
Defendants.

ORDER

The plaintiff in this cause is the District Director of the Birmingham District Office of the Equal Employment Opportunity Commission. She filed this suit against the Equal Employment Opportunity Commission and various officials of the EEOC. Reduced to its essentials, her complaint alleged that she was being harassed and discredited by her supervisors in the performance of her job and that she was not being allowed to perform her job. The defendants thereafter moved to dismiss on the grounds of lack of jurisdiction, failure to state a claim, and mootness.

Having duly considered the matter, the Court is of the opinion that the complaint is due to be dismissed except

to the extent that it might be interpreted as having reference to the attempted removal of the plaintiff from her position as Director of the Birmingham Office in 1975.[1]

It appears from the undisputed facts before the Court that at the time the plaintiff filed her complaint on April 19, 1976, certain aspects of her authority as District Director had been suspended by defendant Donald L. Hollowell, who was Regional Director of the Region which included the Birmingham District Office at the time he suspended her authority. However, subsequent to the filing of the complaint, the plaintiff's full authority as District Director was restored to her on May 3, 1976. It is undisputed that at the present and at all times since May 3, 1976, the plaintiff has been and is fully exercising the full authority of her position as District Director of the Birmingham District Office and that she is not being subjected to any alleged harassment.

In light of these factual circumstances, the Court finds that the conditions of which the plaintiff complained no longer exist, that there is no existing substantial controversy between the parties, and that the cause has become moot. *De Funis v. Ogegaard,* 416 U.S. 312 (1974); *Preiser v. Newkirk,* 422 U.S. 395 (1975); *Locke v. Board of Public Instruction,* 499 F.2d 359 (5th Cir. 1974).

Since there is no suggestion of any reasonable grounds to apprehend a resumption of the acts of which the plaintiff complained in her complaint, it follows that the Court need not retain jurisdiction of this case to protect the plaintiff against any resumption of the conduct

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[1] It is not entirely clear whether the complaint was intended to set forth an allegation with regard to the attempted removal of the plaintiff in 1975.

alleged in her complaint, except to the extent it might have reference to the attempted removal of the plaintiff in 1975. However, since the Equal Employment Opportunity Commission attempted in 1975 to remove the plaintiff from her position as Director at the same time it attempted to remove the plaintiff in *Perry v. Golub, et al.*, Civil Action No. 75-G-1476-S, from his position as Deputy Director and since the Court has retained jurisdiction of the *Perry* case in order to consider any recurrence of allegedly retaliatory conduct, the Court is of the opinion that a similar retention of jurisdiction in this case would be both equitable and appropriate.

It is therefore by the Court ORDERED, ADJUDGED, and DECREED that:

1. Except to the extent that it might be interpreted as having reference to the attempted removal of the plaintiff from her position of Director of the Birmingham Office of the Equal Employment Opportunity Commission in 1975, the complaint be and the same is hereby dismissed, without prejudice.

2. The Court retains jurisdiction of this cause for the purpose of hearing and resolving any claims or issues arising out of any proposal to remove the plaintiff from her position as Director of the Birmingham Office subsequent to the entry of this Order.[2]

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[2]Since there is no reasonable ground on which to apprehend a recurrence of an effort to remove the plaintiff as there is in the *Perry* case, it is not necessary in this case to include the provision of the Order in the *Perry* case requiring a review by the Court of any proposal to remove the plaintiff. In the event any such proposal should be made with respect to the plaintiff, it can be brought to the Court's attention by the plaintiff or by the defendant under the retention of jurisdiction provision of the Order in this case.

3. The question of costs is reserved for future determination by the Court.

DONE, this the 29th day of November, 1976.

/s/ _____
United States District Judge

APPENDIX J

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

CA 75-G-545-S

[Filed: April 1, 1977]

EVELYN FALKOWSKI,
Plaintiff,

v.

LOWELL PERRY, et al.,
Defendants.

ORDER

On Motion of the Plaintiff and for good cause shown the Court amends its Order of 30 November 1976, as follows:

Amend Paragraph 2 to read: "2. In the event the Equal Employment Opportunity Commission or any officer or agent thereof shall propose to remove the Plaintiff from her position of Director of the Birmingham District Office or from the Birmingham District Office by any means, including but not limited to a detail or adverse action, based on any act, occurrence, or situation arising hereinafter, such proposal shall not be initiated, proposed, or implemented unless and until a

petition describing such proposal has been filed with this Court and approved after hearing by the Court."

DONE this 1st day of April, 1977.

/s/ _____
U.S. District Judge

APPENDIX K

[Preliminary Hearing Findings of Fact and Conclusions of Law, entered September 11, 1975, by U.S. District Court of the Northern District of Alabama, S.D. in *Perry v. Golub*, published 400 F. Supp. 411.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PRELIMINARY INJUNCTION HEARING

GUIN, District Judge.

The plaintiff's motion for a preliminary injunction was heard by the Court on August 29, 1975 following notice to all parties. Subject matter jurisdiction, personal jurisdiction over defendants, and venue are not contested. The Court has jurisdiction under 28 U.S.C. § 1343.

I.

FINDINGS OF FACT

Based on the testimony of the witnesses and the exhibits introduced at the hearing, the Court finds that the plaintiff has shown through the evidence that the standards required for preliminary injunctive relief are satisfied.[1]

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[1]E.g., *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572-573 (5th Cir. 1974). It might be noted in the interest of complete analysis that the defendants agree that this

[footnote continued]

A. Substantial likelihood that plaintiff will prevail on the merits:

This case arises from the "permanent reassignment"[2] of plaintiff Bertram N. Perry from his position of Deputy District Director of the Birmingham District Office of the Equal Employment Opportuinty Commission, to be accomplished by placing him on a "detail" of 120 days or less in Washington, D.C. and then reassigning him to another position. The central issues are whether this permanent reassignment was attributed to improper reasons and whether the procedure followed in implementing this permanent reassignment was improper.

(1) Reason for the action:

The initial issue is whether (as plaintiff contends) this reassignment was motivated by the fact Mr. Perry protested and eventually reported to the United States Attorney certain "irregularities" in the handling of cases by District Director Evelyn Falkowski or whether (as defendants contend) it was based on a personality conflict and attendant leadership problems between Mr. Perry and Ms. Falkowski. The Court finds from the evidence introduced at the hearing that Mr. Perry's reassignment was motivated by a desire to remove the

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case should be decided on the basis of the traditional standards governing preliminary injunctions and do not assert any arguments regarding administrative remedies or any different considerations as to injunctions in cases involving Government personnel.

[2]While the testimony was replete with conflict and confusion regarding the nature of the action in question, it was characterized by Acting Executive Director Alvin Golub as being a "permanent reassignment". In view of the undisputed facts that the intention was to remove the plaintiff from the Deputy District Director position in the Birmingham office and that he would not be returned, this seems to be the most accurate phraseology.

source of potentially embarrassing revelations concerning the Birmingham office and by displeasure with Mr. Perry's actions in continuing to protest the District Director's conduct and in taking the matter to the United States Attorney.[3]

The facts established through the evidence are as follows:

1. Mr. Perry has been with the EEOC in Birmingham District office since 1968 and has been the Deputy Director of the office since 1972. He is regarded as one of the most outstanding persons in the EEOC. All of the witnesses, including the defendants' witnesses, agreed that he has superior abilitity in the substantive principles of the Title VII law and in the EEOC compliance procedures, is extremely hard working, insists on quality and dedication in the work performed by EEOC personnel, and has an intense desire to upgrade the ability and workmanship of all EEOC personnel. To the extent that the evidence indicated any fault in Mr. Perry, it is that he does not "suffer fools gladly" and has vocally expressed his criticism of substandard work and departures from EEOC procedures. While he might well benefit from more tolerance of those whose abilities and dedication to work do not match his own, it is abundantly clear that the action taken against him could not be justified on the basis of any deficiencies in his abilities.

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[3]It should be noted that the Court is not passing on the propriety or impropriety of the District Director's actions. That is a question to be resolved by Judge Pointer in the suit brought by the District Director challenging her removal. For purposes of the case before this Court, it is enough that Regional Director Hollowell testified that the investigation resulting from the plaintiff's reports showed what he regarded as "overtones of malfeasance" and "abuses of authority". Nothing said in this case should preclude the District Director from contending or attempting to show that the Regional Director's findings were in error.

2. Ms. Falkowski became Director of the Birmingham office in November of 1974. Within several weeks thereafter, Mr. Perry observed that she was engaged in certain actions which he considered to be improper. According to the evidence in this case, these actions included issuing a cause decision in a case pending in court before receiving the investigator's report on which the decision was supposed to be based, giving instructions to "fail conciliation" (that is, to refuse to settle regardless of any offers made by the respondent), giving instructions to remove a no cause decision from the file in a case pending in court after unsuccessfully trying to change it to a cause decision, and accusing a respondent of destroying and altering records without evidence it was doing so and then blaming this accusation on someone else. The suggestion of the evidence was that many of these actions were seemingly designed to use the Commission's procedures to assist certain plaintiffs and their attorneys in pending court cases.

3. Mr. Perry objected to these actions on the ground that cases should be decided on their facts and in accordance with EEOC procedures and that Ms. Falkowski's actions could cause the courts and the public to lose confidence in the EEOC. On numerous occasions, he expressed his protests against these actions to Ms. Falkowski, to Regional Director Hollowell, and eventually to the United States Attorney.

4. In March of 1975, Regional Director Hollowell assigned a "Regional Review Team" to review the operations of the Birmingham office during the period since Ms. Falkowski had become District Director. The report of the Regional Review Team subsequently led him to conduct a closer investigation into her activities as District Director. This included the propounding to her of

written questions regarding the matters which had been reported by Mr. Perry, as illustrated by the following:

"Johnson et al vs. University of Alabama (Birmingham Campus)–

Query Number 1

In view of the fact that a right-to-sue letter had been issued 9-24-74 and a suit filed December 26, 1974; and inasmuch as ordinarily the administrative process automatically ceases whenever a suit is filed;

a. Why was an investigation of Martha Johnson's charge renewed?

b. At whose instance was it renewed?

c. Did the fact that the aformentioned civil action was pending in any way affect the decision to recommence the investigation?

* * *

Query Number 2

Since the record file shows that the issuance date of the LOD (2-7-74)[4] is seven days earlier than the issuance date of the investigative memorandum signed by the supervisor (2-14-75), please state:

a. How do you account for the LOD having been issued by you a week in advance of the issuance of the investigative memorandum?

b. Since the investigative memorandum had not been issued at the time the LOD was written, upon what evidence was the LOD based?

* * *

[4]The "LOD" is the determination of cause or no cause.

Query Number 8

In part II why does the LOD state that the charging party has been discharged when in fact she has never been discharged?

Query No. 11

You wrote a letter to Dr. Joseph F. Volker, President of the University of Alabama-Birmingham on March 19, 1975 indicating that certain officials 'have been and currently are altering records and other documents which are or may be material evidence in these cases–.' Since this is an extraordinarily serious accusation which is forbidden by the federal regulations, please state upon what specific and objective information you accused state officials of said illegal conduct.

* * *

Morgado vs. Jefferson County Defense Corps–

Query Number 1

Inasmuch as permission had been gotten from D & I to issue a 'no cause' as of April 29, 1975 on the issue of 'failure to reclassify–sex', why was not the LOD issued?

Query Number 2

On May 30, 1975, you issued the following memorandum ostensibly through the deputy to the supervisors – 'when there has been a private suit filed under the 1866 Civil Rights Act, we should never issue a 'no cause' determination unless this is consistent after examining all evidence obtainable from private plaintiff's attorney.'–

Was the issuance of said memorandum in any way related to the instant case or those who have an interest therein?"

It is obvious that these questions were incisive and precisely directed to the points which had been the subject of Mr. Perry's protests and reports.

5. Mr. Hollowell testified that the results of these investigations revealed that Ms. Falkowski was engaged in conduct which had been characterized as having "overtones of malfeasance" and as "abuses of authority". The defendants therefore do not deny that the protests which Mr. Perry had been expressing were shown by the investigation to be well founded.

6. On July 1, 1975, Regional Director Hollowell suspended Ms. Falkowski's authority to "sign off" (that is, to issue) decisions, settlements, and conciliation agreements. Thereafter, by memoranda issued on July 3 and 8, 1975, Mr. Perry was given authority in his capacity a Deputy Director to review and approve cases and to exercise certain management functions.

7. Although Mr. Perry's protests were ultimately vindicated by the investigation, it is undisputed that the defendants were not pleased with his actions in protesting and reporting these matters. Ms. Falkowski, for example, attempted to have him removed from office through an "adverse action", which was rejected on the ground that it would not be upheld by the Civil Service Commission. Similarly, Regional Director Hollowell instructed him not to have any further discussions with the United States Attorney.

8. The situation in the Birmingham office was the subject of a series of meetings held in Washington over a period of four days. These meetings were attended by approximately seven EEOC officials, including Acting Executive Director Golub and Regional Director Hollowell. The initial "consensus decision" of at least the majority of the EEOC officials attending these meetings

was that Ms. Falkowski would be removed and that Mr. Perry would remain in the office. Thereafter, however, this consensus was overruled by Acting Executive Director Golub, who decided that Mr. Perry was to be removed from the Birmingham office. Since Acting Executive Director Golub is second only to the Chairman in the EEOC chain of command, EEOC officials acquiesced in his decision.

9. Having reversed the consensus decision, Mr. Golub called an EEOC personnel official into the meeting and asked him whether the desired end could be accomplished by using the "detail" procedure, to which he received an affirmative answer. Regional Director Hollowell thereafter issued a notice which directed Mr. Perry to report on "detail" to Washington effective August 25, 1975, pending reassignment to some unidentified location. This notice was received by Mr. Perry on August 15, 1975, thus giving him ten days to comply with these instructions.[5]

10. The defendants contend that the last-minute overruling of the consensus decision was based solely on the alleged personality conflict and resulting leadership problems between Mr. Perry and Ms. Falkowski and that Mr. Perry's protests regarding the District Director's activities had nothing to do with it. The evidence does not substantiate this contention and on the contrary points clearly to a casual nexus between Mr. Perry's protests and the decision to remove him from his position as Deputy Director of the Birmingham office.

For example, the defendants' contention rests on Mr. Perry's arguments with Ms. Falkowski, but the defendants do not deny that these arguments resulted from or

[5]It was subsequently agreed by counsel for the parties that the deadline would be changed to September 2, 1975 in lieu of applying to the Court for a temporary restraining order.

consisted in substantial part of his continued protests against her actions as District Director. Similarly, the defendants agreed that there has been a "running rift" between Ms. Falkowski and Supervisor of Conciliations Charles Davis. As one of the defendants' witnesses testified, Ms. Falkowski had "the same problem" with Mr. Davis. However, Mr. Davis, who did not join Mr. Perry in his protests and has not been to the United States Attorney, was not removed, reassigned, or detailed. The defendants offered no explanation for this difference in treatment, and it is a fair inference from the evidence that it was at least partially due to the fact the Mr. Davis did not protest and report the irregularities in the District Director's activities in office.

So also, the decision to remove Mr. Perry from his position was reached at the conclusion of the series of meetings at which the situation which had been uncovered in the Birmingham office as a result of his reports was discussed, and it is inconceivable that the focus of these meetings was on a personality conflict. The defendants would have the Court find that the high ranking EEOC officials attending the meetings were relatively unconcerned about the uncovering of conduct by the District Director which, according to Regional Director Hollowell, "would have prevented the EEOC from being able to protect charging parties in a number of cases" and devoted their attention instead to a personality conflict. That is far too illogical to accept. The conclusion which conforms with logic and with the evidence is that these meetings focused on the serious problem of Ms. Falkowski's actions and Mr. Perry's continued protests and reports regarding her actions.

Similarly, the thinly-veiled warnings given to Mr. Perry when he continued to protest Ms. Falkowski's conduct in

the face of earlier admonitions that he should in effect "leave it alone" cannot be disregarded. The Court finds that the statements made to Mr. Perry – such as "You don't want to be branded as a problem-maker. And you know what I mean" and "If you continue to pursue the Falkowski matter, it will only cause a close look at you" – were meant to convey the message that one who calls attention to an internal problem may himself be treated as a "problem-maker" and may suffer for having done so.[6]

The contention that Mr. Perry's reassignment was based solely on a personality conflict is furthermore inconsistent with the past history of the Birmingham office. While the defendants sought to portray Mr. Perry as having chronic conflicts with Directors, the picture which emerged from the evidence was that he has had such conflicts only with Directors whose actions do not conform to his standards of objectivity and quality. For example, a previous Director of the Birmingham office credibly testified that he and Mr. Perry had a pleasant and productive relationship. Similarly, when Mr. Perry had conflicts with a previous Director, the action taken was the reassignment of the Director.[7]

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[6] An innocuous meaning could not reasonably be given to these warnings. As the Fifth Circuit recently said in finding an improper motive in the statements of a defendant:

> "When extracted from its natural context, Harper's language may indeed appear ambigous. When set within the framework of the evidence as a whole, however, its meaning is clear." *Sabala v. Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975).

[7] The suggestion by defendants' counsel that this previous Director voluntarily left the Birmingham office resulted in obvious reactions of incredulity and shock on the part of EEOC officials in the courtroom, including witnesses for both the plaintiff and the defendants.

It was not until Mr. Perry had protested and reported the irregularities being engaged in by District Director Falkowski that he was himself removed, and it is a logical inference from the evidence that this removal was attributable to more than a personality conflict.

Moreover, to accept the defendants' contention that the removal of both Mr. Perry and Ms. Falkowski was motivated solely by their personality conflict would require acceptance of the corollary proposition that Ms. Falkowski's removal had no connection with her conduct in office even though it had been found, according to Regional Director Hollowell, that "there might even be some compliance indiscretions on her part that were having a negative effect on charging parties, respondents, and the Comission" and that "the errors, if unchecked, would have prevented the EEOC from being able to protect charging parties in a number of cases." The Court cannot accept the illogical conclusion that this information in the possession of responsible officials of the EEOC, the removal of Ms. Falkowski was based solely on a personality conflict. The Court is persuaded the Ms. Falkowski's removal was based on the results of the investigation instigated by Mr. Perry's protests and that Mr. Perry's removal was based on the ground that he was creating potential embarrassment to the EEOC by continuing to protest the District Director's activities and by calling the matter to the attention of the United States Attorney. In effect, the decision was that "Falkowski must be removed because of what she's been doing and Perry must be removed before he blows the lid off any more than he has and to show him that we meant it when we told him to leave it alone."

11. The Court finds that Acting Executive Director Golub's action in overruling the consensus decision and enforcing a new decision to remove Mr. Perry from the

Birmingham office was based on an effort to silence Mr. Perry's protests and reports and to punish him for not heeding the instructions to "leave it alone" and that it was arbitrary and an abuse of administrative discretion.

12. The defendants concede that the duties of Mr. Perry's position as Deputy District Director included the responsibility to report departures from established EEOC procedures and do not dispute that he had the Constitutional right to speak out against the District Director's irregularities in the performance of her office.

(2) Procedure followed:

The evidence regarding the procedure followed in implementing the proposed permanent reassignment can best be described as a morass of inconsistencies in the defendants' evidence. While the defendants' witnesses agreed that the Civil Service Commission regulations define a "detail" as the temporary assignment of an employee with the intention that he shall return to the position from which he was detailed, they inconsistently testified that Mr. Perry will not return to his position. Similarly, while they agree that the regulations define the situations in which a detail may be used, they inconsistently testified that the EEOC has "administrative discretion" to use a detail in other situations and that it can detail any employee anywhere at any time for any reason.

Entirely aside from these conflicts in the defendants' position, it was clear from the evidence that the action in question was not proper "detail" as defined by the Civil Service Commission regulations. The regulations provide that "A detail is the temporary assignment of an employee to a different position for a specified period, with the employee returning to his regular duties at the end of

the detail" and that "the employee continues to be the incumbent of the position from which detailed." Since the defendants' witnesses consistently testified that Mr. Perry was being "permanently reassigned" and would not return to his position, it is obvious that this plan was not a detail as defined by these provisions of the regulations. The regulations further provide that the "Details are intended only for meeting temporary needs of the Agency's work program when necessary services cannot be obtained by other desirable or practical means." The evidence in this case, however, indisputably established that this was not at all the intended purpose. The defendants' witnesses did not even try to claim that there was any work elsewhere for which necessary services could not be obtained by other desirable or practicable means. It was instead obvious from their testimony that this was the converse case of removing the plaintiff and thereafter trying to find some place to put him. Even at that, Acting Executive Director Golub showed considerable discomfort on the witness stand when he was questioned about the work Mr. Perry would be doing and was able to give only vague answers to the question.

For these reasons, the Court finds that Mr. Perry's permanent reassignment was not a detail as defined in the regulations.

2. If it were necessary to give a label to the proposal, it would be an "adverse action". The regulations provide that an adverse action includes "reduction in rank or pay" and that "In law and the Commission's regulations, the term rank means something more than a numerical grade, or class, or level under a classification system or its equivalent in the coordinated Federal Wage System. Basically, it means an employee's relative standing in the

agency's organizational structure, as determined by his official position assignment. —When an employee is made the subject of an official personnel action which results in a lowering of his relative standing in the Agency's organizational structure, a reduction in rank has occurred, even though the employee has not been reduced in numerical grade, or class, or level." In this case, the Court finds from the testimony of Acting Executive Director Golub that the job he says he has in mind for Mr. Perry would result in a lowering of his relative standing in the Agency's organizational structure.

Moreover, the defendants' witnesses sought to justify Mr. Perry's permanent reassignment on the basis of the phraseology that it would "promote the efficiency of the service." It is significant that in doing so, the witnesses were using the provisions of the regulations that "Adverse action may not be taken against an employee covered by this chapter except for 'such cause as will promote the efficiency of the service'" and that an agency may "remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service."

3. The defendants concede that Ms. Falkowski's attempt to remove Mr. Perry through an adverse action in June of 1975 was rejected on the ground that it would not be sustained by the Civil Service Commission.[8] It is apparent that the action taken against Mr. Perry was cast in the form of a detail because it could not be accomplished through an adverse action.

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[8]The regulations provide that "A just and substantial cause is necessary as a basis for an adverse action" and that "any adverse action taken must be based on good cause, be consistent with other such actions taken by the agency, and be fair and equitable."

The defendants further concede that the action against Mr. Perry was taken without compliance with the provision of the regulations that "The agency must observe certain procedural requirements when processing an adverse action", including at least thirty days advance notice which must state any and all materials relied on for the proposed action, allowing the employee a reasonable amount of time to secure affidavits and prepare an answer, and giving of a written decision before the adverse action is effected.

Since the action in question was an adverse action concededly taken without compliance with any of the prerequisite procedural safeguards, and was cast in the form of a detail which did not conform to the applicable regulations for the reason that an adverse action could not be upheld, it was arbitrary and an abuse of discretion and as well an infringement of Mr. Perry's Constitutional rights.

4. In the final analysis, it is not necessary to a resolution of the preliminary injunction phase of this case to decide whether Mr. Perry's reassignment was a "detail" or an "adverse action" or something else. It is the substance and not the form which is controlling, and the overriding and determinative point is that regardless of the form in which it may be cast, the action taken against Mr. Perry has been shown by the evidence at the hearing to be improper. Even if it were a detail, it would not be any less improper, since a legal wrong cannot be transformed into allowable conduct by clothing it in an innocuous form.

(3) Summary:

In sum, based on the facts as found from the evidence presented at the hearing, the Court finds that there is a substantial likelihood that the plaintiff will prevail on the merits on any one or more of the following grounds:

First, that the "permanent reassignment" constituted an attempt to prevent him from discharging the duties of his office or to injure him in his person or property on account of the lawful discharge of the duties of his office.[9]

Second, that it was arbitrary and an abuse of administrative discretion.[10]

Third, that the actions taken against the plaintiff constituted an infringement of his First Amendment and Fifth Amendment rights.

B. Substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted:

The defendants argue that it is common to detail Government employees to temporary duties elswhere. That is doubtless so, but it has no application to the facts of this case. The evidence in this case established without dispute that while Mr. Perry's reassignment has been phrased in the form of a detail, it in actuality consists of a plan to remove him from his position as Deputy District Director of the Birmingham office and to reassign him permanently elsewhere, with the intention being that he would not be returned to the Birmingham office.

The defendants further argue that the resulting separation from his family on the one hand or the necessity of taking his children out of the Birmingham

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[9] 42 U.S.C. §1985(1).

[10] 5 U.S.C. §706. The Court is aware that there are conflicting views as to a Court's jurisdiction and review rights under this statute. Since this ground is not necessary to this decision, there is no need to resolve these conflict.

schools in which they are enrolled is merely an "inconvenience". Even accepting that proposition for purposes of analysis, the effect on Mr. Perry's career cannot be so lightly dismissed.

During his seven year career with the EEOC's Birmingham District Office, Mr. Perry has been successively promoted from positions of investigator and conciliator to Supervisor of Investigations and Deputy District Director, he has served as Acting District Director, he has been rated above average, superior, and outstanding on most of his performance appraisals and has received a number of commendations for his work, and he has established a reputation as one of the most outstanding officials in the EEOC. The injurious impact of the proposed plan on this hard-earned record and on his future career could be incalculable. Even though he might ultimately regain his position in the Birmingham office by reason of a final decision in this lawsuit, no one could doubt that he would carry the stigma of having been involuntarily removed from his position, The stain cast on a person's reputation by an accusation quite often remains unerased by a subsequent vindication.

Moreover, the evidence satisfies the Court that the threatened action would irreparably damage Mr. Perry's status in the Birmingham office. It was apparent from the evidence, and in particular the testimony of former District Director Thomas McPherson, that Mr. Perry's insistence upon quality work and dedication to the task of the EEOC has created some resentments and negative reactions toward him on the part of less able and less dedicated subordinates in the Birmingham office. This resentment and negative reaction provokes no sympathy, since it is after all the duty of a Deputy Director to direct

subordinates in the proper performance of their work.[11] The Court has no doubt that Mr. Perry's removal would lead these subordinates to believe they had prevailed against him and that when he ultimately returned to the Birmingham office through his lawsuit, he would have an even more difficult task in attempting to obtain quality workmanship and hard work from them.

Furthermore, it is not necessary for this Court to bottom its conclusion that irreparable injury was shown on the extraordinary nature of the injuries to the plaintiff shown by the evidence. The Court has found that the action taken against the plaintiff was an infringement of his Constitutional rights, and as stated in 11 Wright and Miller, *Federal Practice and Procedures* § 2948, page 440 (1973):

> "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."

For these reasons, the Court finds that there is substantial threat the plaintiff will suffer irreparable injury if preliminary injunctive relief is not granted.

C. The threatened injury to plaintiff outweighs any threatened harm which the injunction may do to defendants:

The evidence indisputably established that the issuance of preliminary injunctive relief would result in no harm to the defendants. While there was some half-hearted and after-thought suggestion that Mr. Perry's excellent abilities may have been needed in the Washington office,

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[11] Those whose background includes service in the Army may recall that directions received from a First Sergeant have a similar tendency to produce negative reactions.

the evidence left no doubt that this theory was totally devoid of any substance and that the motivating force behind the proposed reassignment was to remove him from the Birmingham office, with only the most minimal and inconclusive thought having been given to what would be done with him once the purpose of removing him from the Birmingham office had been accomplished.

The Court finds that the threatened harm to the plaintiff without question outweighs any threatened harm which preliminary injunctive relief would cast on the defendants.

D. The granting of preliminary injunctive relief will not disserve the public interest:

The evidence convincingly satisfies the Court that the granting of preliminary injunctive relief would in no way disserve the public interest and would on the contrary be in the public interest. If Mr. Perry had engaged in irresponsible or unfounded accusations against the District Director, the result might well be different. But that is not this case. The defendants themselves agreed that Mr. Perry's reports were well-founded and ultimately led to uncovering of a situation which, according to Regional Director Hollowell, could have jeopardized the ability of the EEOC to protect charging parties. It clearly was in the public interest that this situation was uncovered as a result of Mr. Perry's protests and reports, and it is equally in the public interest that he should not be penalized for having had the courage to speak out against it.

Morever, in the Bicentennial year of this Country, it is well to remember that the bedrock of the 200 year history of our democracy has been the individual rights of the citizen. Indeed, the Court has taken an oath

to defend and protect the rights of the citizen. These rights indisputably include the right to speak out against conduct on the part of a Government official, and the evidence before the Court in this case is convincing the proposal to reassign Mr. Perry was motivated by a negative reaction to the excercise of his right to report and correct the situation in the EEOC Birmingham office. To countenance the plaintiff's proposed reassignment could well cast an inhibiting effect on the excercise of his right, not only by him but on other public servants as well. The public interest clearly dictates that the excercise of this legtimate right by Mr. Perry to be protected against the proposal to remove him from the Birmingham office.

With the caveat that this finding is based on the facts of this case and should not be misunderstood as encouraging irresponsible or unfounded accusations in other cases, the Court finds that the granting of preliminary injunctive relief will not disserve the public interest and that it will in fact serve the public interest.

II.

PROPOSAL FOR THE INITIATION OF ADVERSE ACTION

When it became apparent during the hearing that the action taken against Mr. Perry was not a detail as defined in the Civil Service Commission regulations, the defendants' attorneys suggested that the Court should leave the door open for the initiation of an adverse action against him based on his alleged "insubordination" or "mutiny"[12] toward District Director Falkowski. In effect, the proposal was that since the procedure

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[12]The plaintiff's actions were referred to as "mutiny" by the District Director.

followed was improper, the Court should authorize the defendants to back up and start anew by processing an adverse action based on his alleged "insubordination".

The Court has concluded that this would not be appropriate. Regional Director Hollowell testified that the procedure of removing Mr. Perry from the Deputy Director position by means of an adverse action was proposed by Ms. Falkowski in June of 1975 but was rejected on the ground that it would not be upheld by the Civil Service Commission. In view of this fact, it is apparent that the renewal of an adverse action would have elements of an attempt to circumvent the preliminary injunction. Moreover, the alleged "mutiny" was part and parcel of his opposition to the "irregularties" on the part of the District Directer, and the initiation of an adverse action would have the effect of again penalizing Mr. Perry for his actions in protesting the District Director's conduct.

This further comment should be expressed in the hope of avoiding unnecessary complications in this case. It is not within the Court's authority to extend the preliminary injunction to matters involving Mr. Perry's protests (or "insubordination") regarding Ms. Falkowski's activities or to circumstances or events occuring subsequent to the hearing. However, the fact that Mr. Perry's entire career with the EEOC has been in the Birmingham office and the fact the the adverse action proposed in June 1975 was rejected on the ground it would not be upheld should suggest that an attempt to remove Mr. Perry from the Birmingham office during the pendency of the preliminary injunction would be subject to close and careful scrutiny.

III.

CONCLUSIONS OF LAW

The plaintiff has established through evidence that the prerequisites to the granting of a preliminary injunction are met and that a preliminary injunction should be granted to protect plaintiff from irreparable injury and to protect the Court's power to render a meaningful decision. E.g., *Canal Authority of State of Florida v. Calloway*, 489 F.2d 567 (5th Cir. 1974).

A preliminary injunction will be accordingly issued.

IV.

CONCLUSION

Having reviewed the complaint before the hearing, the Court carried the initial impression into the courtroom that Mr. Perry would have a difficult burden of proof to justify the issuance of a preliminary injunction against the reassignment of an official of an administrative agency. By the end of the day long hearing, the Court was firmly convinced that the evidence had overwhelmingly shown a flagrant mistreatment of a public servant whose dedication and insistence upon quality workmanship were conceded even by the defendants and who clearly deserved commendation and not punishment for having the courage of his convictions to speak out against conduct which was confirmed by the defendants' investigations as being seriously improper and destructive of the important function of the EEOC.

A court cannot step beyond the boundaries of permissable judicial action or seek to solve all the ills which afflict society.[13] Yet there can be no reasonable

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[13]See Judge Henry J. Friendly's *Federal Jurisdiction: A General View* (1973).

doubt that a Court would fail to fulfill its responsibilities if it did not extend judicial protection to the plaintiff on the evidence in this case. "The very essence of civil liberty", as Chief Justice Marshall said, "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[14] Guided by this fundamental precept, the Court is confident that Mr. Perry is entitled to the protection of the law on this evidentiary record which reveals a regrettably high handed and improper treatment of his rights and of the outstanding reputation which he has established as an able and dedicated career officer with the EEOC.

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[14] *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

APPENDIX L

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 73P1009

[Filed: Sep. 9, 1974]

EVELYN P. FALKOWSKI,
Plaintiff,

v.

JOHN H. POWELL, JR., Chairman,
Equal Employment Opportunity Commission,
Defendant.

CONSENT ORDER

In this civil action, plaintiff charges defendant, and Donald Hollowell, Atlanta Regional Director of the Equal Employment Opportunity Commission, with discrimination based upon sex and race, in violation of 42 U.S.C. § 2000e and related executive orders. The parties, in order to avoid further litigation and trial, and without any admission of wrongdoing, have conferred at length and now advise the Court that they have resolved the controversy as hereinafter set forth; it is, therefore, hereby ORDERED, ADJUDGED AND DECREED:

1. That in the event vacancies arise in Birmingham District Office of the Equal Employment Opportunity

Commission, at levels considered desirable to plaintiff, including the positions of Director and Deputy Director, defendant shall consider plaintiff's applications therefor [or requests for transfer thereto] in a very favorable light. Civil Service Commission regulations preclude any pre-selection of candidates for any position.

2. That the defendant EEOC shall amend Paragraph 15b(1), of the Equal Employment Opportunity Commission's "Merit Promotion Plan" to include the following footnote: "Provided, however, that such selection does not result in discrimination in violation of the principles of Title VII and other nondiscrimination laws."

3. That defendant shall pay all costs incurred by plaintiff in pursuing her charge of discrimination, excluding attorney's fees.

ORDERED, this 9th day of September, 1974.

/s/ _____
United States District Judge

AGREED TO IN FORM
AND CONTENT:

/s/ Melvyn R. Leventhal
Counsel for Plaintiff

/s/ John J. Pagano
Counsel for Defendant

APPENDIX M

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article [I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the military, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SUBCHAPTER I—GENERALLY

§ 1981. Equal rights under the law

All persons within the jursidiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to

like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R.S. §1977.)

§2000e-2. Discriminaton because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals' race, color religion, sex, or national origin.

§2000e-3. Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this

title [42 USCS §§2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§2000e-2000e-17].

§2000e-16. Nondiscrimination in Federal Government employment

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, [5 USCS §102] in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, [5 USCS §105] United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(c) Civil action by party aggrieved. Within thirty days receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or

after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS §2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) **Application of certain provisions.** The provisions of section 706(f) through (k) [42 USCS §§2000e-5 (f)-(k)], as applicable, shall govern civil actions brought hereunder.

(e) **Continuing responsibility of agencies and officials to assure nondiscrimination.** Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination or employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(July 2, 1964, P.L. 88-352, Title VII, §717, as added Mar. 24, 1972, P.L. 92-261, §11, 86 Stat. 111.)

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No. 79-1244

In the Supreme Court of the United States

OCTOBER TERM, 1979

EVELYN FALKOWSKI, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals issued on July 25, 1979 (Pet. App. 2a-5a), and a related opinion of the court of appeals issued on April 25, 1979 (Pet. App. 25a-26a), are unpublished. The opinion of the district court issued on November 21, 1978 (Pet. App. 6a-22a), is reported at 464 F. Supp. 1016. The related opinions of the district court issued on Novem-

ber 30, 1976 (Pet. App. 27a-46a), and on September 11, 1975 (Pet. App. 58a-80a), are reported at 74 F.R.D. 360 and 400 F. Supp. 409 respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1979. A petition for rehearing was denied on October 29, 1979. On January 9, 1980, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including February 11, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in vacating as moot orders of the district court without reviewing the factual findings of that court.

STATEMENT

This case is part of a complicated series of litigations involving the internal administration of the Equal Employment Opportunity Commission's district office in Birmingham, Alabama. Because of recurring intraoffice disputes, the EEOC had proposed in August 1975 to "detail" Bertram Perry, the deputy district director of the office, to an EEOC office in Washington, D.C. (Pet. App. 4a). Perry brought an action seeking to enjoin that detail and on September 11, 1975, the district court entered findings

of fact and a preliminary injunction prohibiting the removal of Perry from his position in Birmingham (Pet. App. 58a-80a).[1]

In April 1976, petitioner, the district director of the Birmingham office, filed suit against the chairman and other officers of the Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, and under Exec. Order No. 11478 and 42 U.S.C. 1981, 1983 and 1985. She alleged that the Commission had impermissibly retaliated against her for having filed a previous suit against the agency by refusing her certain administrative support and by withholding aspects of authority usually accorded district directors (Pet. App. 3a, 7a, 53a). While the action was pending, on May 3, 1976, the Commission restored petitioner's full authority as district director (Pet. App. 53a). In addition, efforts to detail respondent Perry to Washington were abandoned after the issuance of the preliminary injunction (Pet. App. 44a).

On November 30, 1976, the district court issued orders dismissing as moot both petitioner's and Perry's actions (Pet. App. 27a-46a, 52a-55a). The court held that petitioner's action had become moot because it was undisputed that petitioner had been exercising the full authority of a district director

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[1] Petitioner was originally a defendant to that suit, but the complaint was dismissed as to her on November 23, 1976 (Pet. App. 47a-48a). Petitioner's motion to reconsider the dismissal was denied (Pet. App. 49a-51a).

since May 3, 1976, and there was no reason to believe that resumption of the conduct alleged in the complaint was likely (Pet. App. 53a). Similarly, the court held that no live controversy remained in Perry's case because there was no longer an effort to remove him, and it dissolved the preliminary injunction that had been entered in September 1975 (Pet. App. 44a-45a). However, in order to protect Perry against a recurrence of allegedly retaliatory actions, the district court "retain[ed] jurisdiction" of both suits and enjoined the Commission from initiating procedures to remove either petitioner or Perry without prior court approval (Pet. App. 44a-45a, 54a, 56a-57a). Petitioner and the EEOC appealed from these orders.

While these appeals were pending, problems in the Birmingham office continued. In November 1977, the EEOC filed petitions in the district court for leave to begin administrative proceedings against petitioner and Perry to terminate their employment. These petitions were later amended to seek permission only to transfer petitioner and Perry to different jobs in Washington. In November 1978, the district court ruled on these petitions (Pet. App. 6a-22a). It dissolved the injunction against petitioner's removal, finding that the Commission had legitimate grounds for taking action against her (Pet. App. 12a-14a). The court, however, refused to dissolve the injunction as to Mr. Perry, finding that a retaliatory motive existed for the attempted transfer of Perry (Pet. App. 19a-22a). Petitioner and the EEOC noted appeals from this decision as well.

On April 25, 1979, the court of appeals ruled on the first set of appeals taken from the district court's decision of November 30, 1976, holding that "[t]he district court correctly dismissed these actions without prejudice on account of mootness" (Pet. App. 25a-26a). The court, however, also held that in light of the mootness the district court had improperly retained jurisdiction, and it vacated the outstanding injunctions against actions to remove either Perry or petitioner. The court stated (*ibid.*): "[t]he effect of such dismissals [as moot] was to vacate all underlying proceedings in each case so as to spawn no consequences. The adjudication of mootness eliminated all pending controversies and left the court without jurisdiction to enter those portions of the injunction orders restricting future actions of the parties * * *."

On July 25, 1979, the court of appeals ruled on the second set of appeals taken from the district court's decision of November 21, 1978 (Pet. App. 2a-5a). The court recognized that the appeals were from orders issued in response to petitions that had been required by the November 1976 injunctions ultimately vacated on appeal, *i.e.*, that the judgment appealed from was one that would never have been entered but for the fact that the first appellate decision vacating the injunctions had not yet been entered. Accordingly, the court of appeals vacated the district court's November 1978 orders to the extent that they could be "construed as orders continuing the injunctive features of the void orders of November 30, 1976" (*id.* at 5a). It is this decision that petitioner asks this Court to review.

ARGUMENT

Petitioner contends (Pet. 5-10) that the court of appeals erred in vacating the orders of the district court as moot. Petitioner contends that because of "collateral legal consequences" of "district court findings imputing criminal activity" to petitioner (Pet. 3), the court of appeals should have either reviewed the findings of the district court or summarily reversed them. This contention is without foundation.

Petitioner asserts (Pet. 6) that two decisions of the district court, the November 1978 decision (Pet. App. 6a-22a) and the 1975 issuance of a preliminary injunction in Mr. Perry's action (Pet. App. 58a-80a), impute criminal conduct to her. Specifically, petitioner asserts, without citation, that she was found guilty by the district court of "purposely failing conciliation of cases in order to increase the business of attorneys friendly to her" (Pet. 8). In fact, nothing in either decision can be construed as a finding of criminal activity. The 1978 decision does state that petitioner acted intemperately and violated an internal EEOC guideline (Pet. App. 13a-14a). The 1975 decision quotes the testimony of an EEOC official to the effect that petitioner engaged in conduct that had been characterized as an abuse of authority (Pet. App. 64a). The 1975 decision also notes Perry's charge that petitioner gave instructions to "fail conciliation" (Pet. App. 61a), but only in the context of a decision whether to issue a preliminary injunction, not as a conclusive finding on the merits. Indeed, the court specifically stated that it

was "not passing on the propriety or impropriety of the District Director's actions" (Pet. App. 60a n.3). Thus, petitioner errs in characterizing the district court's decision as a civil case "in which a party is found to be guilty of criminal conduct" (Pet. 7).

Moreover, the decisions below involve no collateral consequences militating against a finding of mootness. In a criminal case, collateral consequences, such as a bar against owning a firearm, may well flow from a conviction. See, *e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 57 (1968). Here, however, petitioner points to no collateral legal consequence other than a vague assertion that the district court decision will have an adverse effect on petitioner's ability to defend a civil damages suit that has been brought by Mr. Perry (Pet. 8-9). Particularly in light of the court of appeals' statement that the dismissals for mootness were "so as to spawn no consequences" (Pet. App. 26a), this assertion is speculative at best. Finally, to the extent that petitioner claims to be harmed by the district court's 1975 decision (Pet. App. 58a-80a), that decision is not part of the case below and is not subject to further review. It was vacated by the district court's 1976 decision (Pet. App. 27a-46a), which was affirmed by the court of appeals on April 25, 1979 (Pet. App. 25a-26a). No petition for certiorari was filed from that decision.

Apart from the alleged collateral consequences, petitioner does not dispute that the causes of action underlying the decision below are moot. This determination was made by the court of appeals in its

April 1979 decision, which has not been challenged, and it is in accord with the decisions of this Court. See *Preiser* v. *Newkirk*, 422 U.S. 395 (1975); *Alejandrino* v. *Quezon*, 271 U.S. 528 (1926). When a legal controversy has ended, it is a waste of judicial resources to require an appellate court to review findings of a district court simply because one party is unhappy with those findings. Such a result would be at odds with the principles underlying the mootness doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

ALVIN GOLUB, *et al.,*
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and

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Evelyn Falkowski hereby replies to the Brief for the Respondent EEOC.

EEOC has been represented by three separate teams of lawyers in this litigation: one in the district court in these cases, another in *Perry v. Falkowski* now pending,

and a third in appellate proceedings. The representations made in EEOC's brief in opposition indicate they have not been communicating with each other about the facts or the record below. EEOC's brief (page 6) states, ". . . nothing in either decision can be construed as a finding of criminal activity." This is patently absurd.

In the 1975 decision (not based on a trial on the merits) the district court found (Pet. App. 59a, 60a):

> . . . Mr. Perry's reassignment was motivated by a desire to remove the source of potentially embarrassing revelations concerning the Birmingham Office and by displeasure with Mr. Perry's actions in continuing to protest the District Director's [Petitioner's] conduct and in taking the matter to the United States Attorney.

and (Pet. App. 61a):

> According to the evidence in this case, these actions [of Petitioner] included issuing a cause decision in a case pending in court before receiving the investigator's report on which the decision was supposed to be based, giving instructions to "fail conciliation" (that is, to refuse to settle regardless of any offers made by the respondent), giving instructions to remove a no cause decision from the file in a case pending in court after unsuccessfully trying to change it to a cause decision . . . . *The suggestion of the evidence was that many of these actions were seemingly designed to use the commission's procedures to assist certain plaintiffs and their attorneys in pending court cases.* [Emphsis added.]

The court found (Pet. 64a) that "Mr. Perry's protests were ultimately vindicated by the investigation."

Such conduct is proscribed by the Criminal Code.[1]

EEOC argues (page 7) that the 1975 decision ". . . was vacated by the district court's 1976 decision . . . ." Assuming, *arguendo,* that it was, it was clearly reinstated by the district court's 1978 decision. The 1975 findings leap-frogged into the 1978 decision (Pet. App. 7a):

> At the preliminary injunction hearing, he [Bertram Perry] established that the "detail" was initiated largely as a result of the EEOC's attempts to suppress his continual and outspoken protest of the BIDO's mismanagement [by Petitioner] made to the Regional Director, the U.S. Attorney, and members of the public.

The 1978 decision quotes extensively (footnote 6, Pet. App. 18a, 19a) from an EEOC proposed disposition on EEO complaints of Bertram Perry involving Petitioner which an EEOC lawyer in the district court below had stated was based on the district court's 1975 decision, "the investigation shows that adverse actions were taken and/or attempted against you [Bertram Perry] because of your persistence in making known irregularities [by Petitioner] in the Birmingham District Office."

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[1] 18 U.S.C. 201.

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of:

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government.

Anyone reading the decisions of the district court will presume that the Petitioner has been found guilty of the conduct enumerated above notwithstanding that the district court entered these findings without considering evidence which refutes such findings.[2] Petitioner has never had an opportunity to refute these findings in the district court. EEOC can't and doesn't dispute this.

The injury to Petitioner's reputation and threat to her career is immediate and is aggravated by the summary decision of the court of appeals.

The Office of the Special Counsel, established to protect "whistle blowers" in the federal government, considers the findings of the district court to be intact. That office wrote the Respondent Bertram Perry on May 14, 1979:

> . . . We note the decision of the U.S. Court of Appeals for the Fifth Circuit vacating the "protective orders" previously issued by U.S. District Judge Foy Guin in your case . . . . However, we have also noted the district court's strongly worded opinion of November 21, 1978, finding overwhelming evidence that the EEOC's decision to process adverse action against you was motivated by retaliation for the exercise of your First Amendment rights.

This letter has been offered by Bertram Perry to support his claims in *Perry v. Falkowski.* The Office of the

[2] Even assuming, *arguendo*, that the district court's findings do not impute criminal conduct to Petitioner in a strict, legalistic sense, the findings of the district court that Bertram Perry is a "whistle blower" for having called Petitioner's conduct to the attention of the United States Attorney clearly imputes unsavory conduct to Petitioner. "In the view of the community, the stain is a deep one; indeed it has become a badge of infamy." *Wieman v. Updegraff,* 344 U.S. 183, 191 (1952).

Special Counsel considers Bertram Perry to be a "whistle blower" and Petitioner to be the whistle blowee because of the district court findings.

The nature of the charges against Petitioner by Bertram Perry and the findings of the district court against her are such that the U.S. Attorney in Birmingham has since 1975 recommended that the Department of Justice not provide Petitioner with legal representation, even though she was sued as an official of the government as well as in her individual capacity. And the Department of Justice has accepted that recommendation. Petitioner has been forced to bear tremendous legal expenses since 1975 which belies the suggestion in the EEOC brief (page 7) that the petition mischaracterizes the nature of the charges and findings against Petitioner.

COLLATERAL CONSEQUENCES

Respondent EEOC cannot in good faith suggest that the collateral consequences to Petitioner are merely "speculative." They are real. And EEOC knows it. Bertram Perry intends to collaterally support his claims against Petitioner in the related pending litigation, *Perry v. Falkowski.* EEOC lawyers are aware of this. *Perry v. Falkowski* is pending before the Honorable Frank T. McFadden, Chief Judge of the Northern District of Alabama. Prior to the decisions of the court of appeals below, in connection with motions filed by the parties, Judge McFadden ruled that he was collaterally estopped by the findings of the district court below. Judge McFadden now has other motions under advisement which will be determined in part by whether collateral estoppel still applies. At a hearing on these pending motions on February 6, 1980, Judge McFadden expressed dismay at trying to understand the effect on

Perry v. Falkowski of the decision of the court of appeals (Pet. App. 2a-5a). All lawyers present, including the two representing the EEOC, expressed agreement with Judge McFadden that the decision of the court of appeals is unclear.

EEOC's concession that collateral legal consequences are "speculative at best" makes it conclusive that the *Sibron* test has not been met in the case at bar. This court has "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." *Sibron,* 392 U.S. at 55. In opposing this petition, the burden is on EEOC to show that there is no possibility of adverse collateral consequences to Petitioner.

The related pending litigation alone presents innumerable probabilities of collateral legal consequences. Can Bertram Perry bring to the attention of the jury in *Perry v. Falkowski* that he has been found to be a "whistle blower" based on the charges he has brought against Petitioner? Can Bertram Perry bring to the attention of the jury that the district court below ruled that he "established that [the EEOC had attempted] to suppress his continual and outspoken protests of the BIDO's mismanagement [by Petitioner], made to the Regional Director, the U.S. Attorney, and members of the public?" (Pet. App. 6a.) Can Bertram Perry use the findings of the district court below to attack the credibility of Petitioner? Petitioner's ability to defend herself in *Perry v. Falkowski* is in jeopardy because the unpublished decision of the court of appeals (Pet. App. 5a) did not deal with the district court findings and there is uncertainty as to its effect. Only this court can remove that uncertainty and restore the *status quo ante* to preserve Petitioner's right to defend herself on the merits.

JUDICIAL ECONOMY

Respondent EEOC argues against "waste of judicial resources."

The *raison d'etre* of the EEOC is to see that charges of denial of constitutional rights are brought before the federal courts without regard to questions of judicial economy. EEOC's indifference to the constitutional rights of Petitioner, its own employee, is ironic.

EEOC's argument is also fallacious. A greater amount of judicial resources will be required if this petition is denied than if it is granted. The controversy still rages in *Perry v. Falkowski.* If the court of appeals' decision is not clarified by this court, an appeal will be the likely result in *Perry v. Falkowski,* no matter how Judge McFadden rules on the issue of collateral estoppel. Both judicial economy and due process dictate that this court exercise its supervisory authority and remove the uncertainty.

At minimum, this court should grant the petition and summarily order that the decision of the court of appeals be modified to reverse all findings made by the district court so as to restore the *status quo ante.*

CONCLUSION

The summary treatment of this case by the court of appeals has resulted in a decision that has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Respectfully submitted,

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